

R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
COURTS OF COMMON PLEAS,
AND
EXCHEQUER CHAMBER,
AND IN THE
HOUSE OF LORDS:

FROM
MICHAELMAS TERM 40 GEO. III. 1799,

TO

MICHAELMAS TERM 42. GEO. III. 1801,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

By JOHN BERNARD BOSANQUET, } and } CHRISTOPHER PULLER,
OF LINCOLN'S INN, Esq. } of THE INNER TEMPLE, Esq.
BARRISTER AT LAW. } BARRISTER AT LAW.

*Ut non difficile sit, quaecunque nova causa, consultatione acciderit,
ejus tenere jus.* CIC. DE LEG.

VOL. II.

L O N D O N :

PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, FLEET-STREET.
1802.

J U D G E S
OF THE
COURT OF COMMON PLEAS,

During the Period contained in this Volume.

Right Honourable JOHN Lord ELDON, Lord Chief Justice, made Lord High Chancellor *Hilary* Vacation 1801, resigned the situation of Chief Justice *Easter* Vacation 1801.

Right Honourable RICHARD PEPPER Lord ALVANLEY, Lord Chief Justice, appointed *Easter* Vacation 1801.

Honourable Sir FRANCIS BULLER, Bart. died *Easter* Vacation 1800.

Honourable JOHN HEATH Esq.

Honourable Sir GILES ROOPE, Knt.

Honourable Sir ALAN CHAMBRE, Knt. appointed *Easter* Vacation 1800.

IN the long Vacation Sir *John Scott* his Majesty's Attorney General was appointed to succeed the late Lord Chief Justice EYRE in this Court, and was created a Peer of *Great Britain* by the title of Baron ELDON of *Eldon* in the county Palatine of *Durham*. His Lordship's promotion taking place during the Vacation, the 39 Geo 3. c. 113. was passed, authorizing his Majesty when a vacancy happens on the Bench during the Vacation, to call any Barrister to the degree of Serjeant, and appoint such person to the Bench. Under this act, Lord ELDON was called and appointed. The motto on his rings was "*Rege incolumi mens omnibus una.*" On the first day of *Michaelmas Term* his Lordship took his seat in this court and the oaths.

Alan Chambre of *Gray's Inn* Esquire, was also appointed one of the Barons of the Court of *Exchequer*, on the resignation of Mr. Baron *Perryn*, and was knighted. His promotion, which took place previous to that of Lord ELDON, was also during the Vacation, and he was therefore called to the degree of Serjeant, under a particular act passed for that purpose (39 Geo. 3. c. 67.) and gave rings with this motto, "*Majorum instituta tueri.*"

Sir *John Mitford* his Majesty's Solicitor General succeeded Lord ELDON as Attorney General.

William Grant Esquire, the Chief Justice of *Chester*, was appointed Solicitor General, and was knighted.

ERRATA

Page 50. note (a) line 6. *for* "Le Blanc, Serjt." *read* "Le Blanc, Just."

(b) — 18. *for* "there" *read* "three"

— 51. note (b) line 25. *for* "in the general issue" *read* "on the general issue" .

• — 115. note (a) *for* "Luethslier's case" *read* "Lethulier's case."

A

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ERRATA.

- Page 50. note (a) line 6. for Le Blanc Serjt. read Le Blanc Just.
 — — — (b) — 18. for there read three
 — 51. — (b) — 25. for in the general issue read on the general issue
 — 73. line 38. in marg. for B. read A.
 — 86. note (a) for Rest. Ent. read Rastall's Entr.
 — 92. — (a) for pead read plead
 — 100. last line for Leache's case read Luch's case Hob. 247. and ~~dele~~ the note at the
 • bottom of the same page.
 — 115. note (a) for Luehslier's case read Lstbulier's case
 — 137. line 11. from the bottom for as it served read as it was served
 — 155. note (a) line 3. after insurance *insert* on goods
 — 176. — (d) for Brown P. C. read 5 Brown P. C.
 — 179. line 7. for Defendant read Plaintiff
 — 182. — 20. for former read farmer
 — 191. — 1. for conscience read convenience
 — 257. — 4. in marg. after to *insert* an avowry for damage seafapce
 — 273. — 7. for quali read equali
 — 289. last line in marg. for recovery suffered read fine levied •
 — 303. note (a) for Count read Court
 — 305. — (a) for if he had no leasehold houses read if he had no freehold houses
 — 398. in marg. for 19 Geo. 3. read 19 Geo. 2.
 — 460. line 27. ~~dele~~ him at •
 — — 28. after forwarded to *insert* him at

C A S E S

ARGUED AND DETERMINED ~~1797~~ 1799.

IN THE

Court of COMMON PLEAS

IN

Michaelmas Term,

In the Fortieth Year of the Reign of GEORGE III.

BAMFORD v. BURRELL.

Nov. 6th.

THIS was an action for goods sold and delivered.

At the Sittings in *Michaelmas* Term 1797 a verdict was found for the Plaintiff on the plea of the general issue, and judgment was signed. Previous to this verdict, *viz.* on the 9th of *August* in the same year, a commission of bankruptcy issued against the Defendant; and on the 4th of *December* following he obtained his certificate. In *Easter* Term 1798 the Defendant applied to the Court to order 48*l.* 12*s.* the debt and costs in the above cause, paid into the hands of the sheriff of *London*, by his bail, to be returned to them on payment of the costs of a *scire facias* issued against them, to enter an *exoneretur* on the bail-piece *nunc pro tunc*, and to set aside the judgment on the *scire facias*, on the ground of his having obtained his certificate before the return of any *c. s.* issued against him before the bail were fixed. The Court at that time directed the parties to go to trial on the question of bankruptcy, the Defendant pleading his certificate; and accordingly at the Guildhall Sittings after that term the cause came on before *Eyre* Ch. Just. when the material facts in evidence were: that the act of bankruptcy was committed by the Defendant on the 8th of *March* 1797, that the debt in question accrued to the

A debt accrued subsequent to an act of bankruptcy, and previous to the issuing of the commission, is not barred by the certificate.

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Plaintiff in *April* following; and that the commission issued on the 9th of *August* in the same year. A verdict having been found for the Plaintiff, and a rule *nisi* obtained by the defendant in *Trinity* Term following for setting aside that verdict and entering one for the Defendant, the case stood over till *Easter* Term 1799.

Cockell and *Shepherd* Serjts. then shewed cause. The question in this case arises upon the construction of the words of the 5 Geo. 2. c. 30. s. 7. where it is said, that "the bankrupt shall be discharged" from all debts by him, her, or them due or owing at the time "that he, she, or they did become bankrupt." Now a manifest distinction appears as well in the statutes relating to bankrupts as in the proceedings themselves between the time of the act of bankruptcy being committed, and of the commission issuing. The 13 Eliz. c. 7. s. 1. directs, that certain persons committing certain acts shall be deemed bankrupts, without referring to any adjudication. In 21 Jac. 1. c. 19. s. 14. the time of suing forth the commission is expressly distinguished from that in which the party becomes bankrupt; it being there enacted, that no *bonâ fide* purchaser shall be impeached, unless the commission to prove the party a bankrupt be sued forth against such bankrupt within five years after he shall become a bankrupt. So in 7 Geo. 1. c. 31. s. 1. which empowers creditors having *debita in præsentî solvenda in futuro* to prove under the commission, the words used are "becoming bankrupts, and commissions of bankruptcy being taken out against them," evidently considering the party as bankrupt independent of the commission. Where it has been the intention of the legislature to give relief against all debts due at the time of the commission, a phrase has been employed expressive of such intention, as in 12 Geo. 3. c. 47. s. 2. by which persons then in custody were discharged from debts due before the issuing of their commissions. The same distinction is preserved in the commission, which states, that whereas the party by exercising trade, &c. did become bankrupt, therefore the commission issues. And it is to be observed, that in pleading, the expression always used is, before the party became bankrupt, not before the issuing the commission. It is the invariable practice of the Court of *Chancery* to expunge debts which have been proved under a commission, where it appears that such debts have been contracted subsequent to an act of bankruptcy. And many commissions have been superseded upon proof of an act of bankruptcy antecedent to the time when the petitioning creditor's debt accrued. As in *De Gols v. Ward, Cas.*
temp.

Temp. Talb. 243. Cooke's B. L. 20. ed. 4. The reason there given by Lord Talbot is, that "the commission must issue on the petition of some creditor who could be relieved under it: but if the debt is subsequent to the act of bankruptcy, the creditor cannot come in under the commission against the effects of the bankrupt, though the person of the bankrupt will be liable." And though that decision was afterwards reversed in the House of Lords, yet it appears by 4 *Brown's Parl. Cas.* 327. and *Ex parte Wainman, Cooke's B. L. 21.* that the reversal proceeded on the ground of the old acts being in force at the time when the commission issued; and it is said by the Lord Chancellor in *Ex parte Wainman*, that if the case had been on the new acts, the Judges would have been of a contrary opinion. There is an anonymous case in 2 *Wils.* 135. *C. B.* which shews that the petitioning creditor's debt must be due from the bankrupt at the time of the act of bankruptcy committed, though it do not become due to the petitioning creditor till afterwards. The act of bankruptcy puts an end to the trading; it subjects the stock and effects of the bankrupt to be assigned; and from that period his accounts ought to be closed.

Le Blanc Serjt. in support of the Rule. The effect of the construction contended for by the Plaintiff will be to work an injustice to the creditors of the bankrupt whose debts have been incurred between the committing the act of bankruptcy and the issuing the commission. For if a merchant after a secret act of bankruptcy carry on trade for any length of time, and obtain goods in the course of that trade to a considerable amount, the creditors anterior to the act of bankruptcy will be entitled by the above construction to a distribution of all those goods, to the exclusion of the very persons by whom they were furnished. The 1 *Jac. 1. c. 15. s. 6.* enacts, that upon lawful warning left "at the dwelling place or house where the bankrupt, his wife or family, for the most part of his abode, did lodge or remain within one year before he, she, or they became bankrupt," the commissioners may proclaim the party a bankrupt. In this case, therefore, it is clear, that the words of the statute must refer to the time previous to the issuing of the commission, and not the committing the act of bankruptcy; for the latter may have taken place by an assignment of the party's effects five years before it was discovered; and the statute could not intend that if he had changed his abode during that time, the warning should be left at the place where he lived when the act of bankruptcy was committed. By 5 *Ann. (a) c. 22. s. 1.* if any

(a) Vid. *Ruffhead's Statutes, Appendix, p. 235.*

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person *who shall become bankrupt* shall remove, conceal, &c. any effects whereof he is possessed to the value of 20*l.* or any books, bonds, &c. with intent to defraud his creditors, every such person *so becoming bankrupt*, and being thereof lawfully convicted, shall suffer as a felon without benefit of clergy. Now, supposing a man to have committed an act of bankruptcy by an assignment of his effects, and afterwards to remove his goods with an intent to defraud creditors, but not to elude the statutes in force against bankrupts, he not considering himself to be a bankrupt, would such a man be liable to an indictment and execution as a felon? The becoming bankrupt, is compounded of the two facts; of his committing an act of bankruptcy, and of the commission issuing against him. The second section of the same act directs, that the certificate shall be signed by four-fifths of the creditors in number and value, who shall have proved their debts: and the 5 *Geo. 2. c. 30. s. 27.* directs the assignees to be chosen by the major part in value of the creditors according to the debts then proved; but if proof of an act of bankruptcy, committed prior to the time when debts of such creditors as have signed the certificate, or voted in the choice of assignees, accrued, be sufficient to destroy their right to prove under the commission, the certificate may be overturned, and the whole proceedings under the commission, unravelled, when every thing is supposed to be settled, the bankrupt having obtained his discharge, and a dividend having been actually made. So the 4*th sect.* of the 5 *Geo. 2. c. 30.* enacts, that “all certificates
“ which have been allowed and confirmed and entered of record, or
“ a true copy of every certificate signed and attested as therein
“ mentioned, shall and may be given in evidence in any of his
“ Majesty’s Courts of Record, and be without any further proof
“ deemed, &c. to be a full and effectual bar and discharge of
“ and against any action or suit which shall be commenced or
“ brought by any creditor of such bankrupt, for any debt or
“ demand contracted, due, or demandable *before the issuing of such*
“ *commission.*” Again, in the 19 *Geo. 2. c. 32. s. 2.* which entitles obligees in bottomree and *respondentia* bonds, and the assured in policies of insurance, to prove their debts where the contingency happens after the issuing of the commission, the expression used is, that “the debt shall be proved, the dividend
“ received, and the bankrupt be discharged, in like manner to all
“ intents and purposes as if such loss or contingency had happened,
“ and the money due in respect thereof had become payable before

“the time of the *issuing of such commission.*” Nothing can more strongly shew the opinion of the legislature, that the time of issuing the commission is the true period up to which all other debts may be proved. With respect to the 12 *Geo. 3. c. 47. s. 2.* which discharged bankrupts in custody previous to 25th *March 1772*, from debts due *before their respective commissions issued*; it is not probable that the legislature intended to put those who had not obtained their certificate, probably in consequence of some misbehaviour, on a better footing than all those who had conformed themselves to the bankrupt laws. From the expressions therefore of all these statutes, it is clear that the legislature has used the term “becoming bankrupt” as synonymous with the term “when the commission issued;” at least in those acts which relate to the proof of debts, and the effect of the certificate, though perhaps in those which describe the circumstances constituting a bankrupt, the act of bankruptcy and the commission may sometimes have been treated as distinct. It is also to be observed, that the Court of *Common Pleas* in *Perkins v. Kempland and others*, 2 *Bl. 1107*, refer to the date of the commission as the period beyond which a debt cannot be proved, and to which the operation of the certificate as a bar is confined.

EYRE Ch. J. It is agreed on all hands that this case is new: we must therefore consider of it; and in entering into that consideration we must look through all the bankrupt laws, and construe the exceptions used in the 5 *Geo. 2.* with reference to the construction which has prevailed upon the rest of the bankrupt laws. The 5 *Geo. 2. c. 30. s. 7.* directs that every bankrupt conforming, &c. shall be discharged from all debts due or owing at the time he *did become bankrupt*: and yet in the 41st section of the same statute it is said, that the certificate, or a true copy thereof, shall be given in evidence, and be a bar to any action brought for a debt due *before the issuing of the commission.* Again, the 7 *Geo. 1. c. 31. s. 1.* which allows holders of bills payable at a future day to prove under the commission, describes the bills in question as bills not due or payable at the time of such person *becoming a bankrupt*; and yet the 19 *Geo. 2. c. 32. s. 2.* allows the obligees in bottomree and *respondentie* bonds, and the assured in policies of insurance to prove in respect of such bond or policy as if the loss had happened before the time of *issuing the commission.* So 12 *Geo. 3. c. 47.* which continued the 5 *Geo. 2. c. 30.* then near expiring, in the second and third sections discharges persons against whom commissions had issued previous to 25th *March 1772*, from all debts due before the *commission issued.* In some places there-

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fore the ambiguous expression "becoming bankrupt" is used, and in others, that of the "issuing of the commission" without any reference to the act of bankruptcy. It should seem therefore, that the two expressions must control and expound each other. Doubtless it is a circumstance of considerable weight, that a practice of expunging debts accrued subsequent to the act of bankruptcy, has prevailed in that Court, to which the general jurisdiction arising under the bankrupt laws belongs. Whatever rule has been adopted in that Court sufficient to afford us a ground for reasoning by analogy is entitled to considerable attention. This however being a new case upon an act of parliament, the decision belongs to the courts of law, and I shall not hold myself concluded by any practice of the court of Chancery. The practice alluded to appears open to many observations. As soon as a single instance had occurred of a debt being expunged, on account of its having been contracted subsequent to the act of bankruptcy, it ought to have been considered as an universal rule to which all the commissioners were bound to conform, that no proof of debts should be received unless the time were also shown when they accrued. It appears however to be the usage of the commissioners, to require no other proof than that the debt was due at the time of issuing the commission; and I am much surprised to find this usage in some degree sanctioned by the observation of Lord Chancellor *Hardwicke*, "that commissioners very rightly declare a man a bankrupt only before issuing the commission, without specifying any precise time (a)." Suppose a creditor to have proved a debt accrued subsequent to the act of bankruptcy, and to have received a dividend: could that dividend be taken from him? Possibly the court of Chancery might hesitate to interfere: but how would the case stand in a court of law? I was much struck with the apparent injustice of excluding the proof of debts accrued subsequent to an act of bankruptcy, and thus allowing the few creditors who existed when the act of bankruptcy was committed to sweep away all the effects acquired since that time, to the prejudice of those very persons by whom they had probably been furnished. Besides, the person of the bankrupt himself, after the surrender of all his property, might still remain liable to the majority of his creditors. I may find myself obliged to say, that the rule which has been adopted must be adhered to,

(a) Vid. 1 Atk. 119.—In 1 Atk. 78. Lord *Hardwicke*, speaking of the clause in the 13 Eliz. which directs the commissioners to pay creditors in proportion to their debts, says: "The question is, what debts are here meant? And I am of opinion, it means debts due at the time of the bankruptcy,

or when the commission issued, which is the same; for to prevent disputes about the time when he becomes a bankrupt, the commissioners always find in general, that he was a bankrupt at the time the commission issued."

and

and that it is for the legislature, not for the court, to make an alteration. Still, however, the consideration of inconvenience will weigh against a great deal of practice in forming my opinion.

Cur adv. vult.

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On this day the opinion of the Court was delivered by

BULLER, J. The question in this case is, whether the certificate be a bar to the Plaintiff's demand? We who were in Court last term (a) have considered the point, and are all of the opinion which I shall now deliver.

By the 5 Ann. c. 22. §. 2. no person *becoming a bankrupt* shall be discharged from all or any debts owing at the time of *such bankruptcy*, unless the certificate be first signed by four-fifths in number and value of the creditors who have proved debts. The 3 Geo. 1. c. 12. recites the same words, and the 5 Geo. 1. c. 24. says, that bankrupts conforming, &c. shall be discharged from all debts due or owing, at the time they *became bankrupt*, and may plead that the cause of action did accrue before such time as they *became bankrupt*. The 5 Geo. 2. c. 30. has the same words. Use has sanctioned them, and it is most clear that they have not been employed unadvisedly or inconsiderately. In pursuance of these statutes the words of the plea have always been, that on such a day the Defendant *became a bankrupt*; under such plea, it has been the constant practice and usage to prove that the day on which the act of bankruptcy has been committed, was subsequent to the contracting of the debt. We think the words of the statute are so explicit that they admit of no doubt, and if there were room for doubt, the usage and practice which have prevailed must decide. The practice of the Court of Chancery to expunge debts which have become due since the act of bankruptcy, is likewise founded on the same construction of the statute, and that affords a very long list of authorities, entitled to the greatest weight and consideration, because the whole business of bankruptcy is the almost daily subject of decision in that Court. I think, it was admitted, that a debt which was not contracted till after the act of bankruptcy, would not be a good foundation for a commission, and if it will not sustain the commission, the proposition, that it may be proved under the commission at all, becomes extremely difficult. The proof of a debt is the same, whether it be the debt of a petitioning creditor or of any other creditor, for the creditor must in every case swear, that the bankrupt was indebted *before*, and at the time of suing out the commission (b).

(a) Buller, Heath, and Rooke, Jt.

(b) 2 Co. B. L. 1. 33.

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But the two grounds of argument insisted on for the Defendant were, first, that a person is not a bankrupt till a commission has issued against him; secondly, that some statutes make use of the words "at the time of issuing the commission," and that all statutes made *in pari materia* ought to be considered together, and expounded by each other. As to the first ground, undoubtedly a man does not fall within many of the provisions of the bankrupt laws till he is declared a bankrupt, and therefore there is the same reason for extending the discharge to that time as to the date of the commission. But that has not been contended for. The commission and the declaration of the bankruptcy relate to the act of bankruptcy, and when a man is declared a bankrupt, he is so to all intents and purposes from the time that the act of bankruptcy was committed. But speaking of a bankrupt in the sense of the objection is a technical use of the word, whereas in the natural sense, it means only having committed an act of bankruptcy. In the affidavit to obtain the commission, the petitioner swears, that he believes the party *is become a bankrupt*, within the intent of the statutes, which being previous to the commission, of course cannot include it. It is impossible to read the case of *Goddard v. Vanderebeyden* without seeing that this point was then considered as clear. It is stated as a thing before settled, that the cause of action must be such as would produce a proveable debt, which, it is said, was not the case there at the time of the *bankruptcy committed*; a term very inapplicable to the issuing of the commission. Lord Ch. J. *De Grey* (a) states the question to be, what debt was due from the Defendant

to

(a) The judgment of Lord Ch. J. *De Grey* in the above case was cited by Mr. J. *Buller* from a manuscript note of the late Mr. J. *Gould*, to the following effect.

De Grey Ch. J. The Defendant in this action being arrested, the present Plaintiff became his bail to the Sheriff, in consideration of which the Defendant promised to save him harmless. The Defendant not having put in bail, the Plaintiff in the original cause sued this Plaintiff on the bail bond and obtained judgment, and he was obliged to pay the debt and costs. To recover this, he sued the Defendant, who pleaded that he became bankrupt before the cause of action accrued; at the trial before Lord *Camden*, a case was reserved, which stated; that in *May* 1763, the Defendant was arrested; that the Plaintiff became bail for him; that in *Mich.* Term

1763 judgment was obtained against the Plaintiff on the bail bond so given by him; that on the 10th of *March* 1764, the Defendant became a bankrupt; that at that time a writ of error was depending on the judgment obtained on the bail bond, which having been carried from the Exchequer Chamber into Parliament, was there non-prossed in *January* 1765; that on the 21st of the same month a *fieri facias* issued against the present Plaintiff at the suit of the Plaintiff in the original action, and thereupon the debt due from this Defendant with the costs was paid, and that on the 2d of *May* 1765, this Defendant obtained his certificate.

The question made is, whether the debt recovered by the Plaintiff was a debt which could be proved as such against the Defendant under the commission, and was therefore

to the Plaintiff on the 10th of *March* 1764, which was the very day on which the act of bankruptcy was committed. Now this

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fore discharged by the certificate: There are three provisions in the bankrupt laws relative to this subject; the first directs what debts shall be admitted; the second, what debts shall be discharged, and the third, how the discharge is to be pleaded. By the old acts of 34 & 35 *Hen. 8. c. 4.* & 13 *Eliz. c. 7.* it is generally provided, that the effects of the bankrupt shall be divided amongst the creditors. The 1 *Jac. c. 15.* directs, that they shall be divided amongst those that come in within four months. No positive rule is laid down in former acts to distinguish who are to be admitted to share, but the principle is to divide equally. The commissioners have a power to take order according to wisdom and discretion, and to fix which debts were owing when the party became bankrupt. The succeeding act of 1 *Jac. c. 15.* takes it up so; and so it is understood in the 21 *Jac. c. 19.* except where execution has been executed at the time of the bankruptcy. The subsequent statutes of 5 *Ann. c. 22.* 5 *Geo. 1. c. 24.* & 5 *Geo. 2. c. 30.* consider it in the same light, making all securities given by the bankrupt to creditors for securing debts due at the time of the bankruptcy, as a consideration for obtaining his certificate, void. With respect to the discharge of debts, the old statutes did not release the person or future effects, but provided that the same remedy should subsist as before for what remained unsatisfied. By 4 *Ann. c. 17.* bankrupts are made subject to imprisonment, and in some cases to capital punishment: but if they conform, then (amongst other things) they are discharged from all debts due and owing when they became bankrupts. The subsequent statutes make the same provision. And when they direct how the discharge is to be pleaded, they provide that if the bankrupt be sued for debts due, &c. he shall be discharged, and may plead that the cause of action accrued before the bankruptcy. Now, may not a cause of action accrue where there is no debt due and owing? Yet the debt must be proveable under the commission, or it cannot be discharged: and to be so, it must be a debt due and

owing, which is the same thing as demandable, which a note payable at a future day is not. The first thing which a creditor must swear to is a sum due: and by 5 *G. 2. c. 30.* he is guilty of perjury if he swear to what is not due, or to more than is due. Therefore, future debts, not then demandable, nor then due and owing, could not be proved. The 7 *Geo. 1. c. 31.* which directs that securities payable at a future day shall be proveable under the commission, and discharged by the certificate, has been held to extend to all kinds of certain debts. *Swaine v. De Mattos*, 2 *Str.* 1211. Contingent debts, however, still remained unprovided for. Therefore, in *Tully v. Sparkes*, 2 *Str.* 867. the Court of *K. B.* held, that a bond for the payment of a sum after the death of the obligor, if he married *M. L.* and she survived him, was not proveable. Parliament then interposed in favour of trade, and by 19 *Geo. 2. c. 32.* made bottomry and *respondentia* bonds proveable. On the principle of these two statutes, the Court of Chancery endeavoured to introduce another case of compassion. Tradesmen generally provide for their families by personal securities: they enter into a bond to pay so much money to trustees on the contingency of the wife or children surviving the obligor. If the contingency had not happened during the commission, these bonds could not come in. But in cases where the bankrupt has died during the proceedings, the bond or covenant becoming due, the Court of Chancery has admitted it; *Ex parte Cajwell*, 2 *P. Wms.* 497. This has been done several times; and Lord *C. King* held, that the distribution of the estate should not wait for the contingency, but that if the contingency happened before distribution made, or even before the second dividend, the creditor should come in. Lord *Hardwicke* on the 6th of *August* 1740, in the case *ex parte Newburgis*, held, that where a bond on marriage was given to trustees to pay a sum of money, if the wife survived, and no dividend had been made before the husband's death, held that the commissioners were right in admitting the trustees. But *ex parte Groome*, 1 *Atk.* 115.

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vided for by particular statutes, are not affected by the commission.

This case admits of many other observations, both on the statutes and the judicial determinations upon them: but, perhaps, I may be thought to have been too prolix already on a point, which appears to have been long and fully settled, and I should not have occupied so much time, but from respect to a great opinion which seemed to differ from that which I now deliver, and to which opinion we all owe the utmost deference. Let the judgment be entered for the Plaintiff.

Judgment for the Plaintiff.

Nov. 12th.

LECHMERE v. RICE.

To debt on
bond the
Court will
permit the
Defendant
to plead
non est factum,
and usury.

WILLIAMS Serjt. shewed cause against a rule *nisi* for pleading to an action of debt on bond; first, *non est factum*; and secondly, that the bond was given upon an usurious consideration: and contended, that although usury was not, strictly speaking, an unconscientious plea, yet, that as it is the constant practice of the Court to refuse a rule of this kind where the pleas are inconsistent (a), they would not depart from that rule in the present instance. He also relied on an affidavit, stating, that the witness to the bond lived in *Worcestershire*, and that the Plaintiff would be put to great expence if he were obliged to bring him to *London* where the venue was laid.

Shepherd Serjt. in support of the Rule, insisted, that the object of pleading *non est factum* was to oblige the Plaintiff to produce the witness to the bond, in order that the Defendant might have the opportunity of cross-examining him as to the usury.

The Court were of opinion that the two pleas were not more inconsistent than many which are allowed to be pleaded together, as not guilty to an assault and a special justification; and that probably the true reason for opposing this rule was, as had been suggested, to keep the attesting witness out of the way. They observed, that the Court of Common Pleas only continued to exercise an authority over applications for pleading several

(a) See 1 *Fellon*, 298. 299. But in *Steele and Others v. Pindar, Barnes*, 347. where not guilty, and a general release were allowed to be pleaded together, a reason was given by the Court which applies to the principal case; viz. that the second plea could not be given in evidence under the general issue; and with this agrees *Shaw v. Everett*, ante, vol. 1. p. 222.

the said James Wright, the Plaintiff, by indenture in his life-time, fully, clearly and absolutely granted, bargained, sold, enfeoffed, and confirmed to the Plaintiff, his heirs and assigns, a certain piece or parcel of arable land (describing it) and all ways waters, &c. and all his estate, right, title, &c. in law or equity, to have and to hold to the Plaintiff, his heirs and assigns, absolutely and for ever; that he warranted it against himself and his heirs, and for himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee simple, and that he had a good right, full power, and lawful and absolute authority to convey; that by virtue of this conveyance the Plaintiff entered and was possessed and fulfilled all his covenants and agreements. "Yet protesting that J. Wright did not in his life time well and truly observe &c. and that the said Defendants have not nor have any of them since the death of the said J. Wright well and truly observed &c. any of the covenants clauses and agreements in the said indenture contained on their part and behalf respectively to be observed, &c. in fact the said Plaintiff says that the said J. Wright had not at the time of making the said indenture nor at any time before or since good right full power and lawful and absolute authority or any right power or authority whatsoever to convey or assure the said piece or parcel of arable land or any part thereof to the said Plaintiff his heirs and assigns in manner

Rule absolute.

(a) 4 Ann., c. 16. s. 4.

BROWNING v. S. WRIGHT and OTHERS, Executors of J. WRIGHT. Nov. 13th.

COVENANT against the representatives of James Wright. The declaration stated, that the said J. Wright by indenture in his life-time, fully, clearly and absolutely granted, bargained, sold, enfeoffed, and confirmed to the Plaintiff, his heirs and assigns, a certain piece or parcel of arable land (describing it) and all ways waters, &c. and all his estate, right, title, &c. in law or equity, to have and to hold to the Plaintiff, his heirs and assigns, absolutely and for ever; that he warranted it against himself and his heirs, and for himself and his heirs, and covenanted that he was, notwithstanding any act by him done to the contrary, lawfully and absolutely seised in fee simple, and that he had a good right, full power, and lawful and absolute authority to convey; that by virtue of this conveyance the Plaintiff entered and was possessed and fulfilled all his covenants and agreements. "Yet protesting that J. Wright did not in his life time well and truly observe &c. and that the said Defendants have not nor have any of them since the death of the said J. Wright well and truly observed &c. any of the covenants clauses and agreements in the said indenture contained on their part and behalf respectively to be observed, &c. in fact the said Plaintiff says that the said J. Wright had not at the time of making the said indenture nor at any time before or since good right full power and lawful and absolute authority or any right power or authority whatsoever to convey or assure the said piece or parcel of arable land or any part thereof to the said Plaintiff his heirs and assigns in manner

A. after granting certain premises in fee to B., and after warranting the same against himself and his heirs, covenanted, that notwithstanding any act by him done to the contrary he was seised of the premises in fee, and that he had full power, &c. to convey the same; he then covenanted for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any person claiming under him; and lastly, that he, his heirs, and all persons claiming under him, should make further assurance. Held, that the intervening general words, "full power, &c. to convey," were either part of the preceding special covenant; or, if not, that they were qualified by all the other special covenants against the acts of himself and his heirs.

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aforsaid or in any manner whatsoever; (a) by reason whereof afterwards and after the making of the said indenture and the death of the said J. Wright to wit on &c. one Edward Child and Mary his wife then being and claiming to be lawfully and rightfully seised of and in the said piece or parcel of arable land with the appurtenances in their demesne as of fee in right of the said Mary and having a lawful right of entry into the same in right of the said Mary by a lawful (b) and rightful title not derived by from under or by means of the said indenture or by from or under the said Plaintiff required the said Plaintiff to deliver up the possession of the said piece or parcel of arable land to them the said Edward and Mary or to become tenants thereof to and to hold the same of the said Edward and Mary at and under a certain yearly rent to wit the yearly rent of thirteen

(a) As the Plaintiff in this case meant to rely on the covenant by J. Wright that he had *good right, full power, and lawful authority to convey*, it seems that after negating the Defendant's title to convey he need not have proceeded to state an eviction; for, on a general covenant, the breach may be as general as the covenant. *Bradshaw's case*, 9 Co 60 b. *Co Ent.* 117. a. *Cro. Jac.* 304. *S. C. Muscot v. Ballet*, *Cro. Jac.* 369 *Glinester v. Audley*, *Sir T. Raymond*, 14. *Wooton v. Hele*, 1 *Mod.* 292. agreed, *Per Cur.* *Holuer v. Taylor*, *Hob.* 12. Indeed, it may be questionable whether the averment, that E. Child and Mary his wife claimed to be lawfully seised of the premises, and required the Plaintiff to deliver up possession or to become tenant to them, and that unless he had accordingly become their tenant, he would have been evicted, and that he did become their tenant, without shewing any entry by E. Child and his wife, or any actual disturbance by them to authorize him in so doing, can be said to be such an averment of *eviction* as the law requires in cases where any averment of this kind is necessary. In *Foster v. Pierston*, 4 *Term Rep.* 620. n. (a) it was admitted that the eviction need not be alleged to have been by legal process; but some eviction must be shewn; for *Shepherds Touchstone*, c. 7. p. 170. speaking of a covenant for quiet enjoyment, and disturbances lawful and unlawful, says, "and in all cases where any person hath title, the covenant is not broken until

some entry or other actual disturbance be made by him upon his title." So in *Hunt v. Cope*, *Comp.* 243 where the Plaintiff, to an avowry for rent, pleaded certain acts of the lessor, "whereby he was deprived of the use of the premises," without averring eviction, Lord Mansfield said, that the lessor certainly should have pleaded eviction, and the facts stated might have been sufficient for the jury to have found a verdict in his favour; and the plea was held ill.

(b) The cases of *Foster v. Pierston*, 4 *Term Rep.* 617. and *Hodgson v. The East India Company*, 8 *Term Rep.* 278. have now completely settled that an allegation of "lawful title" is sufficient, without setting out that title. But the Plaintiff must shew in some manner that the title of the person entering upon him is not derived from himself; and a mere averment that he had "lawful title," without this qualification, would be bad after verdict. *Kirby v. Mansaker*, *Cro. Jac.* 315. *Wooton v. Hele*, 2 *Saund.* 177. 1 *Lev.* 301. 1 *S. d.* 466. 1 *Mod.* 290 *S. C. Jenkins*, 340. This may be done however by averring generally, that the person evicting had lawful title before the date of the grant to the Plaintiff. *Skinner v. Kilbys*, 1 *Showers* 70. *Proffor v. Newton*, 2 *Lev.* 37. *Buckby v. Williams*, 3 *Lev.* 325. *Jordan v. Twells*, *Cas. temp. Haraw.* 172. per *Ld. Hardwicke*, and this mode was adopted in *Foster v. Pierston*.

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~~profits~~ to be therefore paid by the said Plaintiff and would then ~~and there~~ unless the said Plaintiff had so delivered up the possession thereof or become such tenant of and so held the same have ejected evicted expelled put out and amoved the said Plaintiff from and out of the possession thereof whereupon the said Plaintiff to prevent his being obliged so to deliver up the possession thereof or being so ejected evicted expelled put out and amoved then and there was forced to and did become such tenant thereof to and so held the same of the said *Edward* and *Mary* whereby" &c. alleging the Plaintiff's loss in being deprived of his fee-simple, and being obliged to hold as tenant; his having laid out money on the premises previous to his knowledge of the badness of *J. Wright's* title, and his having paid a large sum to *E. Glidd* and *Mary* his wife for the mesne profits.

The Defendants prayed *oyer* of the indenture, and it was read to them in these words, *to wit*, "This indenture made, &c. witnesseth, that the said *J. Wright*, for, and in consideration of the sum of 180*l.* of lawful money of *Great Britain*, to him in hand paid by the said Plaintiff, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, enfeoffed, and confirmed, and by these presents doth fully, clearly, and absolutely grant, bargain, sell, enfeoff, and confirm unto the said Plaintiff and to his heirs and assigns, all that piece or parcel of arable land (describing it) with the appurtenances and the reversion and reversions, remainder and remainders, rents, issues, yearly, and other profits of the said premises, and every part and parcel thereof; and all the estate and estates, right, title, interest, use, trust, claim and demand whatsoever, in law or equity, of him the said *J. Wright*, of, in, to, or out of the said premises, every or any part or parcel thereof; To have and to hold the said piece or parcel of arable land, hereby granted, bargained, sold, enfeoffed, and confirmed, or mentioned, or intended so to be, and every part and parcel thereof, unto the said Plaintiff, his heirs, and assigns for ever, to and for the only proper use and behoof of the said Plaintiff, his heirs and assigns, absolutely and for ever, without any condition, redemption, trust, or revocation whatsoever, and to and for no other use or uses, intents, trusts, or purposes whatsoever; and *the said J. Wright and his heirs, the aforesaid piece or parcel of arable land, hereby granted or mentioned, or intended to be hereby granted*

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unto the said Plaintiff, or his heirs, against him the said J. Wright, and his heirs, shall, and will warrant and for ever defend by these presents. And the said J. Wright for himself, his heirs, executors, and administrators, doth covenant and agree to and with the said Plaintiff, his heirs and assigns in manner and form following, that is to say, that he the said J. Wright for and notwithstanding any thing by him done to the contrary is lawfully and absolutely seised of the said piece or parcel of arable land hereby granted, of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee-simple, without any manner of condition, limitation, use, or trust, or any other restraint, matter, or thing whatsoever, to alter, change, charge, defeat or determine the same; And that he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said Plaintiff, his heirs and assigns, in manner aforesaid; and the said J. Wright for himself, his heirs, executors, or administrators, doth further covenant and agree to and with the said Plaintiff, his heirs and assigns, that he the said J. Wright shall and will, as soon as convenient, set out, at the expence of the said Plaintiff, a cart-way to the said piece or parcel of arable land, through another field in the possession of William Triggs; which cart-way, when set out, the said J. Wright and his tenants are to have a free passage to and from the farm belonging to the said J. Wright, now in the occupation of the said William Triggs, without allowing any thing for the same; And that he, the said Plaintiff, his heirs and assigns, shall and lawfully may, at all times hereafter, peaceably and quietly hold and enjoy the said piece or parcel of arable land hereby granted, and receive the rents and profits thereof to his and their own use and uses, without any manner of let or interruption of the said J. Wright, or any other person or persons claiming under him: And lastly, that he the said J. Wright, his heirs and assigns, and all other persons claiming, or to claim any estate or interest of, in, or to the said premises, or any part thereof, by, from, or under him, shall, and will from time to time, and at all times hereafter, make, suffer, and execute, or cause to be suffered and executed, all and every such further and other lawful and reasonable act and acts, assurance and conveyances in the law whatsoever, for the better and more perfect assuring and confirming of the said piece or parcel of arable land, unto the said Plaintiff, his heirs and assigns, as by his or their Counsel learned in the law of this realm, shall be reasonably devised, advised, or required. In witness

whereof

whereof the said parties to these presents have hereunto set their hands and seals the day and year first above-written."

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The Defendants then demurred, and assigned for causes, "that the said indenture here brought into Court and in the said declaration mentioned doth not contain any covenant or warranty of title to or of right power or authority to convey or assure the said premises in the said declaration mentioned or any part thereof or for the enjoyment of the same by the said Plaintiff or his heirs other than against the said *J. Wright* deceased and his heirs or other persons claiming under him. And for that the said Plaintiff hath not in the said declaration alleged or shewn any defect of title to the said premises or any part thereof arising from or by reason of any thing done by the said *J. Wright* or his heirs or any person or persons claiming under him or any eviction interruption molestation or disturbance done committed or occasioned by the said *J. Wright* or his heirs or any person or persons claiming under the said *J. Wright*. And also for that the said declaration is in other respects defective and insufficient."

Joinder in demurrer.

Williams Serjt. in support of the demurrer. The great question in this case is, Whether the covenant on which the breach is assigned ought or ought not to be confined to the acts of *James Wright* and his heirs? We contend, that eviction by a stranger is no breach of the covenant. In construing this covenant the Court will collect the intention of the parties, not merely from the words of the covenant itself, but by contrasting it with the other parts of the indenture: and it was with the view of enabling the Court to do this that the Defendant prayed *oyer*. The intention of the parties appears to have been, that the words "notwithstanding any act by him done to the contrary" in the first covenant should qualify and restrain the second covenant. When the grantor has in the first clause only covenanted that he was seised in fee notwithstanding his own acts, it would be a very strained construction to hold that he intended in the next clause to covenant that he had a right to convey, notwithstanding the acts of all the world. The covenant for title, and the covenant for a right to convey, are synonymous covenants, and must receive the same construction. The meaning of the covenant in question is further explained by the warranty, and by the covenant for quiet enjoyment; the former being only a qualified warranty against himself and his heirs; and the latter a special covenant that the grantee shall enjoy without

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interruption from him or any person claiming under him. It is not an unusual thing for the Court, in construing covenants, to put a sense upon them which is against the words, provided it be warranted by the apparent intention of the parties. Thus in the Earl of *Clanrickard's* case, *Hob.* 273. a covenant for further assurance of an estate was restrained to a third part. In *Broughton v. Conway*, *Moore* 58. a condition that the vendor would not do, nor had done any act to disturb the vendee, but that the vendee should hold and enjoy without the disturbance of the vendor or any other person, was held to be confined to acts done by the vendor, on the ground of the latter words being referable to the former. So in an action on a covenant "that lands were of the value of 1000*l.* " *per annum*, and should so continue notwithstanding any act done "or to be done by the covenantor," the covenant was construed by the restrictive words in the second member of the sentence, and though the lands were not worth 1000*l.* *per annum* at the time of the covenant made, yet as no act was shewn to have been done by the covenantor to make them worth less, the breach was held ill. *Rich v. Rich*, *Cro. Eliz.* 43. Still stronger, however, is the case of *Nervin v. Munns*, 3 *Lev.* 46. There were four covenants: the first for seisin in fee; the second for right to convey; the third against incumbrances, and the fourth for quiet enjoyment. The first, third and fourth, were expressly restrained to the acts of the grantor, his father and grandfather, and the second was unlimited. The whole Court agreed that the covenants were distinct and several, and three Justices, in opposition to *North Ch. J.* held that the first and second covenants, though distinct, were synonymous; and therefore, as the grantor had first covenanted against his own acts, it could not be intended that he should immediately afterwards, in a covenant to the same effect, covenant against all the world. And they also took a distinction which will afford an answer to all the cases which may be cited on the other side, as well as to *Crayford v. Crayford*, *Cro. Car.* 106. and *Hughes v. Bennet*, *Cro. Car.* 495. Sir *William Jones*, 403. relied on by *North Ch. J.*, namely, that in those cases the covenants were of divers natures, and concerned different things, although relating to the same land.

Shepherd Serjt. contra. The argument of the other side amounts to this, that as some of the covenants in this deed are of a special nature, the Court must borrow the restrictions introduced into them, and engraft them on the general covenant. But this mode of construction cannot be adopted without laying down a general

rule that wherever a covenant against the acts of the grantor only is inserted in a deed, all other covenants, however general, must be restrained thereby. The question, therefore, must be, not whether the Court shall borrow from a special covenant in order to restrain a general one, but whether both are not in effect one covenant. The distinction seems to depend on the words with which the second member of the sentence is introduced. Thus in *Broughton v. Conway*, *Dyer* 240. where the covenant against the acts of the covenantor was followed by the words “but that the assignee may enjoy without disturbance of any person;” the Court considered the latter words to be only a continuation of the covenant. To the same effect is *Piles v. Jervies (a)*, *Dyer* 240. in the margin. These cases expressly proceeded on the meaning of the word “but,” and cannot therefore be applied to this case, where the second member of the sentence is introduced by “and that,” which disjoins it from the first, and makes it a separate and distinct covenant. In *Rich v. Rich* the covenant seems clearly to have contained but one sentence; and as to Lord *Clanrickard*’s case, it cannot apply; for, as only one third part of the estate was conveyed, the covenant for assurance of the estate could only extend to that third part. Of *Nerwin v. Muns* it is sufficient to observe that, after stating a difference of opinion in the Court, it concludes with *sed adjournatur*. The case of *Sir George Trenchard v. Hoskins*, *Winch* 91, 92, 93. was a covenant that there was no reversion in the Crown notwithstanding any act done by the covenantor; and the Court held, that the words “notwithstanding any act done,” restrained the general sense of two preceding covenants, for seisin in fee and power to sell. But that case was afterwards reversed, as appears from a manuscript copy of that book, as well as from 1 *Sid.* 328. though *Saunders*, who was Counsel for the Plaintiff in *Gainsforth v. Griffith*, 1 *Saund.* 60. by attempting to distinguish that case on the grounds of the first judgment, does not seem to have been aware of the ultimate decision (b). In *Gainsforth v. Griffith* it was agreed, that a particular covenant in fact may restrain a general covenant in law; as in *Nokes*’s case, 4 *Co.* 80. But it was laid down, that an express general covenant in fact cannot be restrained by a particular covenant in fact, unless

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(a) See this case set out in a note to *Gainsforth v. Griffith*, 1 *Saund.* 59. by Mr. Serjt. Williams.

(b) In *Siderfin* the Court, speaking of that case, say, “that on a writ of error in

K. B. Jones and the other Justices, except *Whitelock*, held that the judgment below should be reversed;” but it is added, *mer fuit dit que nul reversal fuit enter; ideo quære.*

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the latter can be construed as part of the former. Therefore, in a covenant on the assignment of a lease, that it was a good and indefeasible lease, and that the assignee should quietly enjoy, &c. without any let or disturbance of the assignor, the first covenant was held to extend to the act of a stranger, unrestrained by the latter covenant. So where *A.* covenanted that he was seised in fee notwithstanding any act by him done, and that the lands were of a certain annual value; the latter was held an absolute covenant, that the lands were of such a value. *Hughes v. Bennett, Cro. Car.* 495. *Sir Wm. Jones*, 403. S. C. To the same effect is *Crayford v. Crayford, Cro. Car.* 106. a vendor is always at liberty to covenant for such an estate as he really has, or for an indefeasible estate; if he adopts the latter method, he must be responsible accordingly. Thus where *A.* covenanted that he was seised of a good estate in fee according to the indenture made to him by *H.* (of whom he had purchased,) the covenant was held absolute; for the reference to the conveyance by *H.* served only to denote the limitation and quality of the estate, and not the defeasibleness and indefeasibleness of the title. *Cooke v. Fownds*, 1 *Lev.* 40. 1 *Kel.* 95. S. C. The strongest case, however, on the construction of covenants to secure title, is *Johnson v. Proctor, Yelv.* 175. where *A.* having granted the whole of a leasehold estate of which he had but a moiety, and covenanted for quiet enjoyment of it *against his own acts*, was, under this covenant, held liable on the entry of those who were entitled to one moiety. The only difference between that case and the one on this record is not much in the Defendant's favour, viz. that *J. W.* instead of having a moiety only, had no estate to convey: Should this demurrer prevail, it will establish this principle, that wherever there is any one special covenant in a conveyance, all the general covenants in the same deed must be restrained thereby.

LORD ELDON Ch. J. This case comes before the Court on demurrer, under the following circumstances. The action is brought by *Thomas Browning*, who appears on these pleadings to be the purchaser of an estate of inheritance in fee, and it is brought against the present Defendants who are the personal representatives of the vendor *James Wright*, and are bound by certain covenants which are set forth upon this record. The Plaintiff declares, that by indenture made on the 12th of October 1787 between *James Wright* the testator of the Defendants on the one part, and *Thomas Browning* the present Plaintiff on the other part,

in consideration of 180*l.* paid, *James Wright* fully, clearly, and, absolutely granted, bargained, sold, enfeoffed, and confirmed a certain piece of land, describing it. Now these words "granted, bargained, sold, enfeoffed, and confirmed," certainly import a covenant in law, the effect and meaning of which would be affected by the subsequent words of the indenture. After the *habendum* to *Thomas Browning*, his heirs and assigns, follows this qualified warranty: "And the said *James* and his heirs, the aforesaid piece of land, &c. to the said *Thomas Browning* and his heirs, against him the said *James* and his heirs, shall and will warrant and for ever defend by these presents." This is not a general warranty against all mankind, but against the acts of *James Wright* and his heirs only. Then follow certain covenants in these words. "And the said *James Wright* for himself, his heirs and assigns, doth covenant and agree to and with the said *Thomas Browning*, his heirs and assigns *in manner and form following*, that is to say, That he the said *James Wright* for, and notwithstanding any thing by him done to the contrary, is lawfully and absolutely seised of the said piece, &c. hereby granted of a good, sure, perfect, lawful, absolute, and indefeasible estate in fee-simple, without any manner of condition, limitation, use, trust, or any other restraint, matter, or thing whatsoever; to alter, change, charge, defeat, or determine the same." Then follows the covenant on which the present question arises: "*And that* he hath good right, full power, and lawful and absolute authority to convey and assure the same to the said *Thomas Browning*, his heirs and assigns, *in manner aforesaid*." After this comes a covenant concerning a right of way, which has no relation to this case, except that it may not be immaterial to observe, that this covenant is introduced by the words "And the said *James* for himself, his heirs, executors, and administrators, doth further covenant and agree," which are the initiatory words of the first covenant, and which are not used at the beginning of what is called the second covenant. Perhaps, this may be considered as a critical observation in a case which does not require it. But as what is called the second covenant is only introduced by the words "And that," and in the third (or what may be called the second) covenant, the name of the covenantor is again introduced as further covenanting, it seems to have been the intention of the parties that all the matters which are inserted before the repetition of the initiatory words should be considered as one covenant. This point, indeed, is not necessary to the decision of the case. But even on the

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critical observation which I have suggested, it would not be unfair to hold that what has been stated at the bar as two covenants, is in fact but one. And if this were granted, there would be an end of the whole argument. The grantor then covenants for the quiet enjoyment of the grantee, "without any manner of let or interruption of the said *James Wright*, or any manner of person or persons claiming under him." So that it is clear, that this covenant does not apply to the acts of any persons not claiming under *James Wright*; and in this respect it agrees with the effect of the warranty, and with the words in the introductory part of the first covenant. The last covenant is, that *James Wright*, his heirs and assigns, and all persons claiming any estate or interest to, from, or under him, (which tallies with the warranty, and with the introductory words to the first covenant and last covenants,) would make such further assurance as should be thought necessary. It is certainly true, that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument. This transaction is a purchase of an estate of inheritance in fee, and the first question is, What will be the nature and effect of a conveyance carrying such a contract into execution? If a man purchase an estate of inheritance and afterwards sell it, it is to be understood *primâ facie* that he sells the estate as he received it: and the purchaser takes the premises granted by him with covenants against his acts. If the vendor has taken by descent, he covenants against his acts and those of his ancestor; and if by devise, it is not unusual for him to covenant against the acts of the deviser as well as his own. In fact, he says, I sell this land in the same plight that I received it, and not in any degree made worse by me. It was argued, that if this were so, a man who has only an estate for life, might convey an estate in fee, and yet not be liable to the purchaser. This seems at first to involve a degree of injustice, but it all depends on the fact, whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the re-sale, has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor's covenants against any act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposes to another person to stand in his situation, neither hardship

or injustice can ensue. What is the common course of business in such a case? An abstract is laid before the purchaser's counsel; and though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not, and if any doubts arise on the title, it rests with the vendor to determine whether he will satisfy those doubts by covenants more or less extensive. *Primâ facie*, therefore, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs. With respect to the conveyance of leasehold estates, this is not always so, and there is an obvious reason why this should not be so. Some of the cases rest on the distinction between freehold and leasehold property, and in the case cited from that excellent book the Reports of *Saunders* made more excellent by a late edition, the estate was leasehold. All the muniments of a freehold estate, and every thing which can illustrate the title is in possession of the vendor; but this is seldom the case with respect to leaseholds. With regard to many estates in this town, held under the Duke of *Bedford* and the Duke of *Portland*, it would be next to impossible to shew any thing but the lease itself; the vendors could not produce the muniments of their estates which are deposited in the family chests of those noblemen. It sometimes happens, therefore, that parties require covenants in assignments of this kind of property which are not required in conveyances of freehold; such as, an absolute covenant that the vendor holds a valid and indefeasible lease.

But even where covenants of this kind are introduced, if the words of the deed be that "he covenants in manner and form *afore said*," the Court will look to the former part of the instrument in order to ascertain the sense in which the covenant is to be taken. So in the case of *The Duke of Northumberland v. Errington and Others* (a) where the Defendants covenanted for themselves "*jointly and severally in manner following*," and the deed was so inaccurately drawn, that *primâ facie* some of the covenants appeared to be joint, and some several, the Court of *King's Bench* held, that the general intent of the parties was to be considered, and that the prior words extended to all the subsequent covenants, and made them all joint and several. In the present

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case then we have got thus far. It is quite clear with respect to the warranty that it was not the intention of the grantor to warrant the title against any persons but himself and his heirs. It is equally clear, that it was not his intention to covenant for quiet enjoyment against the acts of any but himself and his heirs: nor was it his intention to make the covenant for further assurance extend to any other persons. We find all these limited covenants in an instrument of purchase, in which we should not expect obligations of greater extent. Then there is one part of the instrument which, if it be taken as a substantive unconnected covenant, and not part of the first covenant, which, however, I think might be done, raises the present question. It has been argued, that this demurrer cannot be allowed without laying down this principle; that any special covenant in a deed will restrain all the general covenants. If that consequence would necessarily ensue, I admit, that the demurrer is not to be sustained. But, I take that to be an inaccurate statement of the case. The question is not whether a special covenant will restrain a general one, but whether the particular covenant on which the action is founded be general or special. And my opinion, upon considering the whole deed, is, that it is a special one. What would be the use of any of the other covenants if this were general? It would be of little service to the grantor to insist that the warranty, and the covenants for quiet enjoyment and further assurance, were specially confined to himself and his heirs, if the grantee were at liberty to say, "I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supercedes them all." It appears to me from the words and context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words "in manner aforesaid;" namely, "for, and notwithstanding any thing by him done to the contrary."

With respect to the cases which have been cited, it is to be observed, that when a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner (a). The principle being once acknowledged, the only

(a) The same doctrine was laid down by Lord Kenyon in the case of *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 148.

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difficulty consists in making the most accurate application of it. In *Trenchard's* case, the estate on which the covenants in question arose was granted under letters patent by the crown; but those letters patent are not stated in any of the reports. We know, however, that in grants of lands by the crown, it is usual to reserve a reversion, which reversion the grantee cannot bar. The grantee having enjoyed the estate for a considerable time, sold to the Plaintiff in the action, and entered into three covenants. First, that he was seised in fee: secondly, that he had good power to convey; and thirdly, that there was no reversion in the crown *notwithstanding any act done by him*. The contest in the cause was to apply the concluding words of the third covenant to the two prior covenants: there was a great difference of opinion upon the subject, not only between the individual Judges, but between the different Courts before whom it was argued; and the only ground upon which I can suppose that Court to have proceeded, which decided that the words were not connected with the first covenant is this, that they considered it to have been the intention of the parties that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one; namely, that he should not be liable on the objection of a reversion existing in the Crown, unless that reversion appeared to have been vested in the crown by his own acts. The case of *Johnson v. Proctor*, in *Yelverton*, proceeded on the principle on which this demurrer may be decided, *viz.* that the covenant is to be construed according to the intention of the parties. There the grantor having stated in the recital that he was interested in the whole of the premises, when in fact he was interested in a moiety only, the Court would not permit him to contend that a covenant for quiet enjoyment "notwithstanding any act done by him," was satisfied by a compliance with the mere words of that covenant in a case where the grantee had suffered eviction not in consequence of any act done by the grantor, but in consequence of the badness of his title. The recital itself amounted to a warranty. *Gainsforth v. Griffith* was a case of leasehold property. The first covenant there was, for an indefeasible title, and was a separate and distinct covenant; and the second was for quiet enjoyment, notwithstanding the assignor's own acts. He seems, therefore, to have said, I not only covenant for the goodness of my title, but that you shall enjoy under that title without any interruption from me. The nature of the assurance shews it to have been the intent of the parties that the words in the last covenant should not

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standing any act done by him; and the second, that he has good right to convey the estate of which he is seised.

ROOKE J. I have entertained some doubts upon this question: but upon the whole of the argument, I am now satisfied that the judgment of the Court must be directed by the intent of the parties; and that the intent sufficiently appears. But as the case has been very fully discussed, I shall only add, that the two clauses appear to me to constitute but one covenant, and that the restraining words must be applied as well to that member of the sentence which asserts that the grantor is lawfully seised, as to that which asserts that he has a right to convey.

Judgment for the Defendant.

Nov. 15th.

HALL v. ODY.

The costs of two actions between the same parties though in two different courts may be set off against each other. And in *C. B.* this may be done notwithstanding the lien of the Attorney for his costs.

COCKELL Serjt. this day shewed cause against a rule *nisi* for setting off the costs of an action of ejectment recovered by the present Defendant against the present Plaintiff in the *King's Bench*, against the costs of an action of trespass in this Court, in which the plaintiff had recovered a verdict; and insisted that in all the cases where a set off of this kind had been allowed, both actions had been in the same court; as in *Thrustout d. Barnes v. Crafter*, 2 Bl. 826. *Schoole v. Noble* and others, 1 H. Bl. 23. *Nunez v. Modigliani*, 1 H. Bl. 217. *Vaughan v. Davies*, 2 H. Bl. 440. and *Dennie v. Elliott*, 2 H. Bl. 587. (a) But the Court overruled the objection, saying that a set off had even been allowed between costs in a court of equity, and costs in a court of law; and Heath J. observed, that he remembered a case where an ejectment having been brought in the *King's Bench*, and afterwards a *formedon* in this court, proceedings were stayed in the latter until the costs of the former were paid.

Cockell Serjt. then stated that he opposed the rule on the part of the Plaintiff's attorney who had not been paid his costs, and represented that the Plaintiff himself was now in prison. He cited *Mitchell v. Oldfield*, 4 T. R. 123. to shew that the attorney has a lien on the judgment for the amount of his costs (b).

(a) See also *O'Connor v. Murphy*, 1 H. Bl. 657. (b) Also *Randle v. Fuller*, 6 T. R. 457.

Shepherd Serjt. *contra*, relied on *Dennie v. Elliott*; where it was held, that whatever might be the rule in the *King's Bench*, yet according to the practice of this Court the lien of the attorney was subject to the equitable claims of the parties.

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LORD ELDON Ch. J. Finding it to be the practice of this Court that an attorney shall not take his costs out of the fund, which by his diligence he has recovered for his client, where the opposite party is entitled to a set off, it does not become me to say more than that I find it to be the settled practice with much surprize, since it stands in direct contradiction to the practice of every other court as well as to the principles of justice. In the Court of Chancery the same parties are often concerned in many suits, and I never knew the idea entertained of arranging the funds till the respective attornies were paid their costs. However, as the attorney in this case has acted with a knowledge of the settled practice of the Court, he can have no right to claim the advantage of a more just principle; and it will only remain for the Court to consider, whether the practice of the court of *King's Bench* should not be adopted here for the future.

HEATH J. I have no objection to have the practice reconsidered.

ROOKE J. There can be no objection to reconsidering the practice, but it does not appear to me to be unfair as it stands at present. The attorney looks in the first instance to the personal security of his client, and if beyond that he can get any farther security into his hands, it is a mere casual advantage.

Rule absolute.

PARKER, One, &c. v. VAUGHAN and Others.

Nov. 15.

THIS was an action for use and occupation, in which the Plaintiff, who was an attorney of this court, sued by original, and obtained a verdict for 1*l.* 1*s.*

Shepherd Serjt. on a former day obtained a rule *nisi* for entering a suggestion on the roll according to the provisions of 23 *Geo. 2. c. 33. s. 19.* on the ground of the Defendant being resident in *Middlesex* and liable to be summoned to the county court.

Cockell Serjt. now shewed cause against that rule on two grounds: First, because the Plaintiff was an attorney of this court, and was

If an attorney of C. B. bring an action by original in that court, against a Defendant resident in *Middlesex*, and recover under 40*s.* the Court will allow a suggestion to be entered under 23 *Geo. 2. c. 33.* of *Middlesex*.

s. 19. An action for use and occupation may be brought in the county court

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same to sale, is situate within two miles of the suburbs of the city of *London*, and is not situate within the city of *Westminster*, or the liberties thereof : And the said *Thomas* and *John* further say, that the late sovereign Lady *Elizabeth* Queen of *England*, by her letters patent bearing date the 26th *May*, in the eleventh year of her reign, for herself, her heirs and successors, ordained, that all the freemen of the city of *London* of the art or mystery of bakers, in the said city of *London*, and all the freemen of the said city, as well of the white bakers, as of the brown bakers, and all others occupying or using within the said city or its suburbs, or any of them, the mystery or art of baking any bread of any sort to be exposed to sale for the regulation and ordering of the said art or mystery, from thence for ever should be, by virtue of the said letters patent, a body corporate and politic, in deed, fact, and name, by the name of the master, wardens, and commonalty of the mystery of bakers of *London*, and from thence for ever, should by that name have perpetual succession, sue and be sued, and have a common seal : And the said Queen did by the said letters patent for herself, her heirs and successors, grant to the said master, wardens, and commonalty, or their successors, that from thenceforth for ever there should be *one master of the said mystery and four guardians* thereof to be chosen, named, and appointed as in the said letters patent is more fully set forth : And the said Queen did further of her free grace, certain knowledge, and mere motion, will, and by the said letters patent, grant for herself, her heirs, and successors, to the said master, wardens, and commonalty, and their successors, that the *master and wardens for the time being, and their successors* for ever, should have, enjoy, and exercise *by themselves or their sufficient deputy or deputies* within the said city and the suburbs thereof, and *in all other places within two miles every where round the suburbs of the said city of London*, the full and entire overlooking, examination, correction, punishment, and government of the said mystery and commonalty of freemen of the said mystery, and of all other freemen of the said city of *London* and suburbs thereof, and of all and singular other strangers, as well within as without the said suburbs, using the art or mystery of bakers, making and exposing to sale any sort of bread within the said city or the liberties and suburbs thereof, and of all other strangers, of what sort soever, in any way exercising or using the art and mystery of a baker within the said city and suburbs, or any of them, or elsewhere, in any other place not distant more than two miles from the suburbs of the said city

of London, (the said Queen's city of *Westminster*, and the liberties thereof only excepted,) according to their sound discretion as by the said letters-patent now remaining of record in his Majesty's High Court of Chancery at *Westminster*, reference being thereunto had, may more fully appear, which said letters patent were afterwards and after the granting thereof (*to wit*) on the same day and year and aforesaid by the persons to whom they were directed, accepted, that is to say, at the parish aforesaid, in the county aforesaid. And the said Thomas and John further say, that before, and at the time when, &c. the said Thomas was master of the said mystery, and that one Andrew Wright was one of the wardens thereof, to wit, at, &c. And the said Thomas and John further say, that the said Thomas and the said Andrew Wright being such master and warden of the said mystery, and the said Plaintiff to exercising and using the art or mystery of a baker as aforesaid, they the said Thomas and the said Andrew Wright for the purpose of overlooking the said Plaintiff in his said art and mystery of a baker, and of examining whether the bread by him baked and exposed to sale in his said dwelling house was of a proper and sufficient weight according to law, and the said John as their servant in their assistance, and by their command, at the said time, when, &c. entered the said dwelling-house of the said Plaintiff, situate in the parish and county aforesaid, in which he so used and exercised his art and mystery of a baker, and exposed bread so by him baked to sale, and then and there took down, and took hold of, and weighed parcel of the said bread, so being there exposed to sale as they lawfully might for the cause aforesaid, and in so doing did necessarily stay and continue the space of ten minutes in the said dwelling-house as they lawfully might for the cause aforesaid, which are the said trespasses in the introductory part of this plea set out. And this, &c. wherefore, &c.

To this there was a general demurrer and joinder.

Runninton Serjt. in support of the demurrer. First, it does not appear that the Defendants had any authority to enter the Plaintiff's house; for such an authority can not be incident to the power of overlooking, &c. given by the charter, since even if it had been given in express terms, it would have been void. If derived from custom such an authority might possibly be good, for the distinction is taken in the case of the city of *London*, 8 Co. 125. a. that *fortior et potentior est vulgaris consuetudo quam regalis concessio*, and accordingly it is there stated that there is a custom of *London*

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"to enter a house of another which is his castle (a)." Besides the plea states, that the defendant exposed the bread to sale at his house; the Defendants therefore might have overlooked it without entering the house. Secondly, it appears, that the persons incorporated by the charter were all the freemen of the city of London, using the mystery of baking within the city and its suburbs; they were the only persons to whom the charter was directed, and by them only therefore can it have been accepted. *Rex v. Amery*, 1 Term Rep. 584. per Ashburst J. But the authority given by the charter is not only to be exercised within the city and the suburbs, but in all other places within two miles everywhere round the city. To the persons without the city the charter was not directed, by them therefore it was not accepted, and consequently they cannot be bound by it (b). *Bagge's case*, 1 Roll. Rep. 226. 2 Brownlow 100. and *Rex v. Dr. Askew*, 4 Burr. 2200. It is clear from the pleadings, that the Plaintiff's house is not within the city or the suburbs, the venue being laid at *Christ Church*, in *Surrey*, and the plea averring the house to be "within two miles of the suburbs of the city." Thirdly, the authority has not been strictly pursued. The charter created one master and four wardens, and the authority is to be executed by the master and wardens for the time being "by themselves or their sufficient deputy or deputies;" admitting therefore, that a majority of five might have exercised the authority, yet the trespass in this case being only justified as the act of the master, one of the wardens and a third person in their aid, the justification is insufficient. Nor can these persons be considered as deputies of the five, since if there was a deputation, it should have appeared to have been made by the concurrent appointment of the five, or at least of the majority. In *Bull* 105. where a writ was directed to eight *nominatim* and seven only certified, it was held to be bad (c).

Shepherd Serjt. contra was desired by the Court to argue the last objection, as they should not feel themselves called upon to decide

(a) In 1 Lev. 15. it is said by the Court that the customs of London are of such force that they will stand good against negative acts of parliament.

(b) But a corporation enabled by charter to make by-laws for the regulation of a particular trade in a particular place, may make by-laws binding on persons exercising that trade in that place, though not members of the corporation. *The Butchers' Company*

v. *Morey*, 1 H. Bl. 370.

(c) In *Norris v. Staps*, Hob. 210. a declaration in the name of A. and B. guardians, and the fellowship of, &c. on a by-law made by two guardians, and the majority of the fellowship, was held bad among other reasons, because it did not state how many guardians were appointed by the charter, and there might have been more than two.

upon the others, if that was well grounded. He admitted that where a power is granted to a definite number of persons, it must be exercised by the majority, but contended, that the Defendants in this case acted ministerially as the agents and servants of the master and wardens, that they entered the Plaintiff's house with a view to overlook only, and that their act was afterwards to be submitted to the judgment of the majority of persons to whom the power was granted; that it might be collected from the plea that they were only acting as deputies of the others, and that although no deputation was averred, such omission could only be taken advantage of on special demurrer.

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But *the Court* were of opinion, that the omission was a subject of general demurrer, for the authority was void if the deputies were not well appointed.

LORD ELDON Ch. J. This declaration calls upon the Defendants to shew by what authority they entered the Plaintiff's premises. The plea refers to the letters patent of incorporation, and asserts that the Defendants had authority in manner and form therein described; that is, a right of overlooking and correcting the trade. Now, it is obvious, that on a question, whether bread be wholesome and sound, persons may differ in opinion, and a tradesman is not to be subject to the judgment of a single person, where the authority is vested in several. With respect to the right of exercising that authority by deputy, the same joint discretion must be employed in appointing the deputy which is necessary to the execution of the authority itself.

Per Curiam;

Judgment for the Plaintiff (a).

(a) *Vid. et. Grinley v. Barker and Others. ante, vol. 1. p. 227.*

PARIENTE v. PLUMSTREE.

Nov. 18th.

THIS was an action on the case against the Defendant as sheriff of Kent. The first count of the declaration complained that the Defendant having arrested one *W. J. Stephens*, at the suit of the Plaintiff, on a *capias ad respondendum* returnable in eight days of *Saint Hilary*, indorsed for bail 14*l.* 1*s.* 6*d.* suffered him to escape, and falsely returned *cepi corpus*; and the second count, that he neglected to arrest *W. J. Stephens* on the *capias ad respondendum*, and falsely returned *cepi corpus*.

The sheriff having arrested a party permitted him to go at large without taking a bail bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in

bail: held that he was not liable either to an action for an escape, or false return.

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The cause was tried before *Rooke J.* at the *Westminster* sittings after last *Trinity* Term, when it appeared in evidence that the Defendant had actually arrested *W. J. Stephens* in obedience to the writ, but had afterwards suffered him to be at large without having taken a bail bond; that the Plaintiff on the return-day ruled the Defendant to return the writ, who accordingly returned *cepi corpus*; that the Plaintiff having afterwards served the Defendant with a rule to bring in the body he put in bail, and *W. J. Stephens* before the expiration of the latter rule surrendered himself in discharge of those bail. A verdict was found for the Plaintiff, with liberty to the Defendant to move to set it aside.

Accordingly a rule *nisi* for a new trial having been obtained, *Shepherd* and *Bayley* Serjts. now shewed cause.. Before the 23 *H. 6. c. 9.* the sheriff was bound to have the body at the return of the writ; and since that statute the only sufficient excuse which he can offer for not having the body is, that he has taken a bail-bond. In this case he neither had the body at the return of the writ, nor had taken a bail-bond. Though the Plaintiff may proceed against the sheriff in such a manner as to make him liable to an attachment, yet his right of action commences at the time when the writ is returnable, and nothing will wave that right. Indeed it is necessary to rule the sheriff to return the writ, in order to procure evidence to support this action, for without so doing the Plaintiff could not ascertain what return the sheriff would make: and the same thing is done in cases where the sheriff is proceeded against for extortion or any other misconduct. If the sheriff omit to take a bail-bond before the return of the writ, he cannot afterwards retake the party; for the writ is *functus officio*, and he will be guilty of a trespass if he attempt it. *Atkinson v. Matteson*, 2 *T. R.* 172. Where a bail-bond has been taken, and the sheriff is afterwards irregular, the Court never allows the Defendant to try the cause, without directing the bail-bond to stand as a security. Now in this case the Defendant will be permitted to try, and yet there is no bail-bond to stand as a security. Merely putting in bail at a time subsequent to the return, cannot be deemed having the body at the return of the writ: and as it appeared by the bail-piece, when produced in evidence, at what time the bail was put in, the Court cannot presume the proceedings of the sheriff to have been regular when the contrary has been shewn. In *Jones v. Eamer*, *Anstr.* 675, it was expressly decided in the *Exchequer*, that putting in bail after the return of the writ, and before the rule to bring in the body had expired, was no defence to an action against the sheriff for returning *cepi corpus* where he

had permitted the Defendant in the original action to go at large without taking a bail-bond, and had him not at the return of the writ. That case proceeded on the authority of *Ellis v. Yarborough*, 1 *Mod.* 227.

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Cockell and *Runnington* Serjts. *contra* were stopped by the Court.

LORD ELDON Ch. J. In *Fuller v. Prest*, 7 *T. R.* 109, it was decided by the Court of *King's Bench*, that where the sheriff permits the party to go at large and does not take a bail-bond, it is a breach of his duty for which he is answerable, if bail are not put in within due time. The result of this case is, that putting in bail in due time is an answer to the action, and that he is only liable where he has not done so. I cannot conceive on what grounds the case in the *Exchequer* was decided.

BULLER J. I never knew a more groundless application: the whole of the argument proceeds on a fallacy. The foundation of it is, that the party did not appear at the return of the writ. But the record does not shew at what period bail were put in. When once put in they are to be considered as bail of the term generally. In the report of *Jones v. Eamer*, the Court are said to have proceeded on the authority of *Ellis v. Yarborough*, as directly in point. But that case was determined upon another ground. The object of ruling the sheriff to return the writ is to ascertain whether he has taken the party or not; and if he return *cepi corpus* he must put in bail. Now if this action could be maintained it would in fact be going to a jury to ascertain whether the Court has done right in giving the sheriff the usual time to put in bail. It is a sufficient answer to the action that an appearance was entered. As to the production of the bail-piece at the trial; that was evidence which ought not to have been admitted, and yet it is upon that evidence that the action is attempted to be supported. There is a case in *Saunders* where it is said by the Court, that if the sheriff take a prisoner and detain him in his custody, and at the return of the writ return *cepi corpus* and have not the body in court he shall be amerced to the King, but the party shall not have an action against him (a).

(a) *Poslerne v. Hanson and Another*, 2 *Saund.* 60. The above observation was made by the Court with a view to shew, that where a sheriff takes a bail bond, and has not the body at the return of the writ, he is not liable to an action. They reason thus. Before the stat. 23 *H. 6. c. 9.* if the sheriff had actually detained the party, but had him

not in Court at the return of the writ, he could only have been amerced, and since that statute he is to be considered in the same condition, after taking a bail-bond, as if he had actually detained the party. But in the principal case the sheriff neither took a bail-bond, nor had the Defendant in custody.

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HEATH J. There is a case of *Murray v. Durand* in *Espinasse's* Cases at *Nisi Prius* (a), which shews that this action cannot be maintained: for Lord *Kenyon* there ruled that an allowance of bail above, subsequent to the commencement of an action against the sheriff for an escape, and for not assigning the bail-bond, was a sufficient answer to such action; saying, that though the bail were put in and justified after the proper time, still that when once put in and justified they were subsisting bail and must be taken *nunc pro tunc*.

ROOKE J. of the same opinion.

Rule absolute.

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JONES v. ARMYTAGE.

Copy of a writ against *William Armytage*: notice to appear "*Catherine Waller*, you are served," &c. the mistake held fatal.

THE Defendant in this case having been served with a copy of the process, and notice to appear at the foot thereof, as required by 5 *Geo. 2. c. 27. s. 4.*, the latter varied from the former, thus; in the copy of the writ the name of the Defendant *William Armytage* was properly inserted, but the notice was "*Catherine Waller* you are served, &c." On this ground, *Shepherd* Serjt. on a former day obtained a rule *nisi* to set aside the proceedings, and *Runnington* Serjt. now shewed cause.

The Court were of opinion, that the mistake was fatal.

Rule absolute.

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TURNER v. BRISTOW.

If bail be brought up on the same day on which an attachment has been obtained against the sheriff, the Court will permit them to justify, and set aside the attachment on payment of costs.

THE Rule to bring in the body having expired on the 16th (*Saturday*) *Shepherd* Serjt. obtained an attachment this morning (*Monday*). *Heywood* Serjt. now mentioned that he was instructed to justify bail this day, and urged, that the Court would therefore set aside the attachment, as it had been often said, they would not allow any advantage to be obtained by mere priority of motion. He cited *Thorold v. Fisher*, 1 *H. Bl. 9.* to shew, that had he justified before the motion for the attachment, the latter would not have been granted.

The Court said, that on payment of costs (a), the attachment must be set aside.

(a) Note, the rule for the attachment had not been drawn up, and it was intimated that it ought not to be drawn up; so that the costs given were only those of preparing for the rule for the attachment.

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JORY v. ORCHARD.

Nov. 18th.

TRESPASS for taking and driving away the Plaintiff's cattle.

The cause was tried, before *Grose* J. at the last Summer assizes for *Cornwall*, when it appeared that the Defendant took the cattle as a distress for non-payment of a poor-rate, by virtue of a warrant from a magistrate, which was produced and read. The counsel for the Defendant then called on the Plaintiff to prove a demand of a copy of the warrant pursuant to 24 Geo. 2. c. 44. s. 6. (a) upon which a paper was produced by a witness, who swore that it was a copy of the demand of the warrant. It was objected, however, that such copy could not be read in evidence without proof of notice given to the Defendant to produce the original: in answer to which, it was shewn, that the Plaintiff's attorney intending to deliver a demand under the above act, made out two papers for that purpose precisely to the same effect, and signed them both for his client; one of which he delivered to the Defendant, and the other, which was the paper now produced, he kept in his own possession. This the learned judge refused to receive, because no notice had been given to produce the demand delivered to the Defendant, which he thought the best evidence; accordingly he directed a nonsuit.

If a Plaintiff's attorney previous to bringing an action for a distress under the warrant of a magistrate, make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to 24 G. 3. c. 4. s. 6. and sign both for his client, and then deliver one to Defendant, the other will be sufficient evidence at the trial.

A rule *nisi* having been obtained upon a former day for setting aside this nonsuit,

Bayley Serjt. now shewed cause. First, The demand left with the Defendant ought to have been produced. There is no reason why the general rule, that a copy cannot be read without notice to produce the original having been given, should not apply to this case. If a letter be written, and the party writing it enter a copy in his letter-book and sign it, would it not be necessary to give notice to produce the original before the duplicate could be ad-

(a) That section enacts, "that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in obedience to any warrant under the hand or seal of any Justice of the Peace, until demand hath been made or left at the

"usual place of his abode by the party or parties intending to bring such action, or by his, her, or their attorney or agent in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand."

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mitted in evidence? A party can prove nothing by a copy where it would be necessary after producing the original to go one step further, in order to establish its validity. Now, in the present case, the act not only requires that a demand in writing should be made, but also that it should be signed, and if the demand left with the Defendant had been produced, the signature must have been proved (a). Secondly, The demand ought to have been signed by the Plaintiff himself, and not by his attorney. This point indeed was not raised at the trial, but it is competent to me to insist upon it, since it would afford a sufficient answer to the action in case of a new trial being granted. The ground of the objection is, that the word "party" appears never to have been used in the act to signify any person except the Plaintiff in the cause. Having therefore obtained that peculiar meaning, it must be so understood in this instance.

The Court intimated an opinion, that the latter objection was unfounded.

Lens Serjt. in support of the rule. The question is, whether the paper produced were in fact a copy, or whether it were not as much an original as that delivered to the Defendant. The analogy to be drawn from the case of a man writing two letters precisely to the same effect, signing both, and sending one to his correspondent, and retaining the other, is in favour of the Plaintiff, for I contend, that the letter so retained would be of equal validity with that which was sent. Here two originals were created, one of which was delivered to the Defendant, and the other was kept for the purpose of being made evidence. It is like the case of a notice to quit, where a duplicate is always admitted as evidence.

Lord ELDON Ch. J. With respect to the only question which arose at *nisi prius*, namely, whether this paper is to be considered as a copy of the original notice, or as a duplicate original, the strong inclination of my opinion is, that it is a duplicate original which, under the circumstances of the case, afforded evidence

(a) This distinction seems authorized by *R. v. Smith*, 1 Str. 126. more fully reported *Vin. Abr.* tit. Evidence, A. b. 26. pl. 68. where on a motion, that a Justice of Peace might produce on a trial of an indictment for subornation of perjury, an examination taken before him from a woman, who had been convicted of perjury, the Court after consideration made the order, saying "a

"copy of the examination is no evidence, because it deprives the party of controverting whether it were his hand subscribed to it or not, and therefore the original ought to be shewn, and so it is in all cases where written evidence is produced which is grounded on being under a man's hand." See also *Hoe v. Nathorp*, 1 *Ld. Raym.* 154.

enough for the Plaintiff to insist that the trial should proceed. I have looked into the act of parliament with a view to discover a ground on which any distinction may be founded between the notice required by the first section, to be given to Justices of the Peace previous to the commencement of an action against them, and the demand required by the sixth section; but without success. Unless I am mistaken, it is the usual course in actions against Justices of the Peace to produce a duplicate original; and the same thing is done with respect to notices to quit. It is true, that a notice to a Justice of the Peace need not be signed either by the Plaintiff or his attorney; though on the back of it the name and place of abode of the attorney must be indorsed; but it must have certain specified contents, and the production of a copy, or duplicate of that notice therefore is not the very best evidence to prove that the notice had the contents specified in the act. So a duplicate of a notice to quit is not the very best evidence of the contents of the notice delivered; for in that case also the contents may be proved to a certainty by the production of the notice itself, and the supposed duplicate original may be inaccurate. I do not see on what ground the distinction between those cases and this can be supported, the Plaintiff having shewn, that the paper produced was signed in the manner required by the act. The practice of allowing duplicates of this kind to be given in evidence, seems to be sanctioned by this principle, that the original delivered being in the hands of the Defendant, it is in his power to contradict the duplicate original, by producing the other if they vary. We cannot hold the paper produced in this case to be insufficient, without overturning the practice in actions against magistrates, and in cases of notices to quit, unless I mistake as to what that practice is—conceiving it to be as I have stated, I think this nonsuit cannot be supported.

BULLER J. I am confident that this question has often arisen and been decided at *nisi prius*. But points of this kind pass unnoticed unless afterwards moved in Court. The attorney in this case made two copies of the paper, one of which he meant to deliver; he signed both, and it was indifferent which of them he delivered, for they were both originals. It appears clearly from the report that the nonsuit was directed on the ground of the paper produced in evidence being a copy; but I think it clear, that both the papers were originals. With respect to the second point, I agree with my Brother Bayley, that if any thing appear upon the report which would be the cause of a nonsuit at the second trial,

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the Court will take it into consideration, though not expressly reserved. But the statute in question not being a penal act, the Court are not bound to construe it strictly. I think, therefore, the demand being signed by the Plaintiff's attorney for him, is within the meaning of the statute, a demand signed by the Plaintiff.

HEATH J. I am of the same opinion. In principle I cannot distinguish this case from that of a duplicate notice to quit, which is received in evidence.

ROOKE J. I confess, that I cannot make up my mind to agree with my Lord Chief Justice and my Brothers. The act requires this demand to be signed. In the other cases which have been mentioned, both the notice delivered, and the duplicate retained, may be considered as originals. But here something more is to be done beyond the mere production of the paper; the signature is to be proved; and how that is to be proved, by shewing that another paper was signed by the party, I do not perceive. I think that the Plaintiff should have given notice to produce the original demand before he could entitle himself to give the counterpart in evidence.

Rule absolute.

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HOLIN v. BARGUS.

In this Court notice of declaration is not necessary in bailable actions.

THE Plaintiff in this case having sued out a bailable writ, filed a declaration *de bene esse*, and gave a rule to plead; on the evening of the day on which bail were perfected (the Rule to plead being then expired) he served the Defendant with a demand of a plea, and on the next day signed judgment. *Williams* Serjt. having obtained a Rule *nisi* for setting aside this judgment on the ground of a notice of declaration being necessary in this as well as in an action not bailable, and that any distinction between the two in this respect was not well founded; *Cockell* Serjt. shewed cause, and relied on *Simmons v. Shannon*, 3 *Wilf.* 147. 2 *Bl.* 725. S. C. and *Shuttleworth v. Feilder (a)*, *Hil.* 37 *Geo.* 3. C. B. where the distinction between actions bailable and not bailable with respect to giving notice of declaration, was recognized.

Williams contra observed, that the two reports of *Simmons v. Shannon*, in *Wilson* and *Blackstone* varied materially from each

(a) This case was cited from a manu- | C. B. p. 234. ed. 4. made by one of the
script note in the margin of *Impey's Pr.* | officers of the Court.

other;

other; that in the former of these books, a difference of opinion was stated to have existed among the prothonotaries and secondaries upon this point, and that the Court there intimated an intention of making a Rule to settle it. He also alluded to the practice of the *King's Bench*, where notice is equally required in either case (a).

The Court agreed, that the practice of the *King's Bench* was the most consistent, but thinking the point settled in this Court refused to set aside the judgment unless on payment of costs.

(a) See *Reg. T.* 2 *Geo. 2.* D. R. also 4 *Sellow Pr.* 234. ed. 2.

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JOHN and CHARLES CARTWRIGHT v. AMATT and Another. Nov. 18th.

THIS was an action on the case for the infringement of a patent.

The declaration, after stating the grant of the letters patent to one *Edmund Cartwright*, the inrollment of the specification, &c. proceeded to aver, that "the said *Edmund Cartwright* afterwards and before the committing the several grievances hereinafter-mentioned, to wit on, &c. at, &c. by a certain indenture then and there made between the said *Edmund Cartwright* of the first part, the Plaintiffs of the second part, and certain other persons therein respectively mentioned and referred to, of the third and fourth parts (one part of which, &c.) did for the considerations therein mentioned, grant, bargain, sell, assign, transfer, and set over unto the Plaintiffs, their executors, &c. the beforementioned letters patent, &c. saving, excepting, and reserving unto the said *Edmund Cartwright*, his executors and administrators, until the final determination or conclusion of a certain suit in the said indenture mentioned then depending, and now long since ended and concluded, such of the said letters patent in the said indenture mentioned, as should be necessary to be given in evidence for the support of the said suit, and the legal right and interest of the said *Edmund Cartwright* in and to the same to hold," &c.

The cause came on to be tried before *Rooke J.* at the *Guildhall* sittings, after last *Trinity Term*, when the deed of assignment being produced in evidence, it appeared from the recital, that as there was a suit depending between *Edmund Cartwright* Plaintiff, and

A. by indenture (reciting that a suit was depending between him and *B.* respecting certain patents, and that the same could not be assigned without hazard of defeating the suit) granted absolutely the said patents together with some others to *C.*, excepting however until the determination of the above mentioned suit, such patents as should be necessary to support *A.*'s legal title. Then followed a covenant that *A.* upon the determination of the suit, should assign the excepted patents to *C.*

and that until such assignment, *A.* should stand legally possessed of the same. Held, that the legal interest in the excepted patents vested in *C.* upon the determination of the suit, without assignment.

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William Toplis Defendant, respecting an infringement of certain letters patent, and until such suit had been legally tried, the legal right or property of the said *Edmund Cartwright*, in such letters patent as related to the inventions of combing wool and similar articles (which were the letters patent in question) could not, it was apprehended, be fully assigned or made over by him to the Plaintiffs without hazard of defeating the said suit, it was agreed, that in the mean time, and until such suit was determined, *Edmund Cartwright* should continue legal owner of the patents, in trust for the Plaintiffs, in whose custody they were to remain, and who were to have all the benefits arising from them: Then followed an absolute grant of the letters patent in question, together with others, to the Plaintiffs with the following exception "save and except nevertheless, and out of these presents reserving unto the said *Edmund Cartwright* until the final determination or conclusion of the suit or action now depending between him the said *Edmund Cartwright* and the said *William Toplis*, all such of the said herein beforementioned patents as are or shall be necessary to be given in evidence for the support of the said suit or action, and the legal right or interest of the said *Edmund Cartwright* in and to the same, upon the trusts," &c. After the trusts was inserted this covenant for further and better assigning the letters patent "that when and so soon as the said suit or action now depending between the said *Edmund Cartwright* and the said *William Toplis* shall have been finally determined, he the said *Edmund Cartwright* shall forthwith thereafter well and effectually grant, assign, and make over to the Plaintiffs upon the trusts, &c. the said herein before excepted grants or letters patent, touching or relating to the said inventions, and every or any other matters, in contest for which the same were reserved out of these presents, and the specifications thereof and all his legal and other estate and interest therein; and that in the mean time and until such last-mentioned assignment thereof, shall be made and executed, he the said *Edmund Cartwright* shall and will stand legally possessed of, and interested in the same reserved grants or letters patent for the behoof of them the Plaintiffs, their executors, &c. subject to the same trusts," &c. It was objected on the part of the Defendants, that as no assignment had taken place subsequent to the determination of the depending suit, the legal interest, not being vested in the Plaintiffs by the deed produced, still remained in *Edmund Cartwright*, and therefore

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the Plaintiffs could not recover. The learned judge being of that opinion, directed a nonsuit.

Runnington Serjt. on a former day moved to set aside this nonsuit, and contended, that it was the manifest intention of the parties that the whole legal interest should pass to the Plaintiffs as soon as the suit, which was depending, should be determined, and that the last covenant, which was only inserted *pro majori cautela* ought not to be allowed to defeat that intention; a rule *nisi* was accordingly granted.

On this day *Shepherd* and *Lens* Serjts. were to have shewn cause against that rule;

But *Rooke* J. said, That on a further consideration of the effect of the deed than was given to it at *nisi prius*, he was convinced that the legal interest vested in the Plaintiffs immediately on the determination of the suit that was depending at the time when the indenture was executed.

And the rest of *the Court* having expressed themselves clearly of the same opinion,

The rule was made absolute without argument.

DONNELLY v. DUNN.

Nov 19th.

THIS was an action of debt on a recognizance of bail. The Defendant pleaded the bankruptcy of his principal circumstantially (a); to which there was a general demurrer and joinder.

Bail cannot plead the bankruptcy and certificate of their principal in their own discharge.

Bayley Serjt. in support of the demurrer. Admitting this plea to be well pleaded, I contend that it is not competent to the bail to plead the bankruptcy of their principal. By the 5 Geo. 2. c. 30. s. 7. the plea of bankruptcy is put into the mouth of the bankrupt only, and the bail, if entitled to any relief, must obtain it by application to the summary jurisdiction of the Court. The Legislature has provided for all the difficulties to which the bankrupt may be subject; if he be arrested, he shall be discharged on common appearance, s. 7.; if obliged to plead, the general plea is given him; if under the necessity of supporting that plea by

(a) He had before pleaded it more generally, and obtained leave to amend; *vide ante* vol. 1. p. 448. There was another action brought by *Donnelly* against *MacLagan*, the other bail, under circumstances precisely similar to *Donnelly v. Dunn*, which came on at the same time, and on which the same judgment was given.

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evidence, the 41st section of the act is in his aid ; and if taken or detained in execution, he shall be discharged on summary application, s. 13. ; but there are no provisions in favour of the bail. The mode in which they have usually been relieved may be collected from some cases on the subject. In *Roy and Others v. Hussy*, E. 24 Geo. 2. *Barnes* 104. the Defendant having become bankrupt pending the action, an *exoneretur* was entered on the recognizance : and in a note to that case, it is observed, that it was a new practice introduced to discharge the bail in a summary way, without putting them to the trouble and charge of surrendering the principal as formerly. This shews the contemporaneous opinion of the profession respecting the act of Geo. 2. for if the Defendant could have pleaded the bankruptcy, the Court would not have interfered. A similar account of the practice is given by Lord Mansfield in *Martin v. O'Hara*, Cowp. 824; and by Buller J. in *Southcote v. Braitbwaite*, 1 Term Rep. 624. . Indeed, it was strongly intimated by this Court on a late occasion, that the bail could not in any case plead the bankruptcy of their principal. *Donnelly v. Dunn*, ante, vol. 1. 448. and *Beddome v. Holbrooke*, *ibid.* in notis. This is a new experiment, and if allowed to succeed, might in many cases be highly prejudicial to justice.

Marshall Serjt. *contra*. I do not mean to controvert the authorities by which it is established, that the Court has power to discharge the bail on a summary application, where the principal has become bankrupt and obtained his certificate : but I contend, that if the bankruptcy and certificate be a legal discharge to the principal, it is a legal discharge to the bail ; and if so, may be pleaded. Indeed, it is the only way of investigating whether there be any fraud in the means by which the certificate was obtained ; and so the Court seem to have thought in *Vincent v. Brady*, 2 H. Bl. 1. The plea merely states that the bankrupt has got his certificate ; and if the Plaintiffs meant to shew that it was obtained by fraud, they should have replied it. From the terms of the recognizance, which are, “that the principal shall surrender himself or pay the debt,” it is doubtful whether the bail can surrender him against his will. If then he will not surrender himself, shall not the bail be at liberty to pray him in aid ?

LORD ELDON, Ch. J. It is not the interest of the bankrupt to refuse to surrender himself in discharge of his bail. The execution of his creditors against him is barred by the certificate ; but if he allow his bail to pay the debt, he thereby creates a new creditor

creditor for a debt to the same amount, which is not barred by the certificate. The plea of bankruptcy is given to the bankrupt to be made use of as the means of discharging himself, if he so please. But there may be many cases in which the bankrupt may not chuse to make use of his certificate. If he has been guilty of a fraud, he may be fearful of bringing it forward. If he has acquired an accession of fortune subsequent to the obtaining of his certificate he may be ashamed to plead it. Shall he then, through the medium of his bail, be obliged to make use of his certificate whether he will or not? It is the duty of the bail, under their recognizance, to render the bankrupt; and it remains with the bankrupt himself to determine whether any use shall be made of the certificate. Suppose the two bail to be creditors sufficient in number and value to sign the certificate; if they could plead it also, they would have it in their power to sign their own discharge.

BULLER, J. It is of importance to the public, and to the profession, to put an end to attempts to introduce upon the record questions of practice which cannot be considered as legal defences, but which belong rather to what may be called the equity side of the Court. This action is brought for a legal demand arising upon a debt of record; and the Defendant is called upon to state a legal defence upon record, not merely to say that he has equity in his favour. Now, what legal defence has he set up? He must either shew a legal impossibility to perform the condition of the recognizance, or state something that will discharge him. Has he done either? Certainly not. Then the Plaintiff remains unanswered.

HEATH, J. It does not follow that the bail are to have all the advantages to which their principal is entitled. Suppose in an action on a judgment there be manifest error on the record, the bail cannot avail themselves of such error, though the principal may.

LORD ELDON, Ch. J. added, We do not mean to preclude any application for summary relief on the part of the bail; but the opinion of the Court is, that on this record judgment must be given for the Plaintiff.

Judgment for the Plaintiff.

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FOWLER v. MORTON.

If an affidavit to hold to bail state the circumstances under which a debt accrued, and conclude "by reason whereof the Defendant stands indebted in — l. which he hath refused and still refuses to pay," it is bad. If such an affidavit negative a tender in "notes of the Bank of England, payable on demand," it is a sufficient compliance with 37 Geo. 3. c. 45 §. 9. though the words of that act are "expressed to be payable on demand."

THE Defendant in this case was held to bail upon an affidavit of the Plaintiff, stating that the Defendant on or about the 5th of May 1799 agreed with the Plaintiff, who was a common carrier, that if the Plaintiff would give up to him the business of a common carrier he would pay to the Plaintiff 4 l., would take his cart at a valuation, and pay the amount of all the book-debts due to the Plaintiff up to the time of making the agreement: that the cart was valued at four guineas, of which the defendant had notice; that the book-debts amounted to 4 l. 9 s. 7 d. of which the Plaintiff informed the Defendant; that in pursuance and performance of the above agreement, the Plaintiff did give up the business to the defendant, who had ever since carried it on.—"By reason whereof the said *Christopher Morton* became indebted to him the deponent in the sum of 12 l. 13 s. 7 d. out of which the deponent had received the sum of 1 l. 1 s. only: and by reason thereof the said *Christopher Morton* now is, and standeth justly and truly indebted to him the deponent in the sum of 11 l. 12 s. 7 d. which he hath refused and still doth refuse to pay." The affidavit further stated that no offer had been made by the said Defendant to pay the said sum of 11 l. 12 s. 7 d. (the debt sworn to) "in notes of the Governor and Company of the Bank of England, payable on demand."

Lens. Serjt. on a former day moved for a rule to shew cause why the bail-bond should not be cancelled on the defendant entering a common appearance. He stated two objections to the affidavit; first, that the debt was not sworn to positively, on account of the words "by reason whereof:" secondly, that in the denial of a tender in Bank-notes the notes were not described in the words of the act of parliament (a) which are "expressed to be payable on demand."

The Court refused the rule upon the latter objection, but granted it upon the former:

Against which objection *Williams Serjt.* now contended, that although the plaintiff had stated more than was necessary, yet that the debt for which he held the Defendant to bail was sworn to with certainty.

(a) 37 Geo. 3. c. 45 §. 9.

But *The Court* being of a contrary opinion made the rule absolute (a).

Rule absolute.

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(a) *Vide Mackenzie v. Mackenzie*, 1 Term Rep. 716. and *Wheeler v. Cofeland*, 5 Term Rep. 564.

WALLACE v. ARROWSMITH.

Nov. 21st.

HERWOOD Serjt. shewed for cause against a rule nisi for staying proceedings on the bail-bond, that the bail put in were both clerks to the defendant's attorney, and being therefore within the rule of Court (a), the Plaintiff had a right to treat the bail as a nullity, and take an assignment of the bail-bond. He cited *Cornish v. Ross*, 2 H. Bl. 350.

If two of attorney's clerks be put in as bail, the Plaintiff may treat such bail as a nullity and take an assignment of the bail-bond.

Bayley Serjt. *contra* insisted, that though the bail might have been rejected had they been brought up to justify, yet it was not competent to the Plaintiff to determine on their sufficiency; and relied on *Thomson v. Roubell*, Doug. 466. *in notis*, where it was so decided. *Heywood* then cited *Fenton v. Ruggles*, ante, vol. 1. 356. where the Court, in a similar case to this, held that the plaintiff might take an assignment of the bail-bond:

And *The Court* recognizing that case

Discharged the rule with costs.

(a) *Reg. M. 6 C. 2. Also Laing v. Cundale*, 1 H. Bl. 76.

SPICER v. TEASDALE.

Nov. 23d.

THE Plaintiff in this case declared upon a bill of exchange; the declaration contained three counts; to the two first the Defendant demurred, but judgment was given for the Plaintiff, who then entered a *nolle prosequi* as to the third; costs having been allowed to the plaintiff upon all three counts, he entered up judgment for himself upon the two first; but afterwards finding a mistake in the second count, he altered the judgment by entering it for the Defendant upon that count.

The bail being sued, *Shepherd* Serjt. on a former day moved to set aside the judgment on two grounds; first, because the Plaintiff was not entitled to costs upon the two last counts of the declaration; and secondly, because after entering up judgment for himself on the second count he had no authority to alter it.

If a Plaintiff obtain judgment upon one of several counts in a declaration, he is entitled to the costs of the whole. And if after entering up judgment for himself upon two counts he discover an error in one of them, he may waive his judgment on that count and enter it for the Defendant.

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Cockell Serjt. now shewed cause, and contended that by the practice of the *Common Pleas*, if the Plaintiff obtain judgment upon one count, he is entitled to the costs of the whole declaration (a); and that in the present case the Plaintiff, on discovering his mistake, had a right to wave his judgment on the second count and enter it for the Defendant.

The Court were of opinion that the Plaintiff had a right to wave his judgment on the second count, and that the bail ought not to be allowed to hold him to it, against his inclination; and agreed, with respect to the costs, that the practice of this Court had been correctly stated on the part of the Plaintiff. But *Buller* J. added, that the practice of the *King's Bench* was different, and indeed more reasonable; for there, if judgment be given on demurrer for the Plaintiff on some counts, and for the Defendant on the others, the Plaintiff is entitled to costs on those counts only on which he has judgment, though costs are not allowed to the Defendant on the others (b); and that an intention had been intimated

(a) This was settled after much discussion in *Brydges v. Raymond*, 2 Bl. 800; and in *Norris v. Waldron*, 2 Bl. 1199. the same rule was allowed to prevail, though the counts were for different causes of action. However it is stated by *LeBlanc* Serjt. 8 Term Rep. 467. that in Tr. 32 Geo. 3. the court of *Common Pleas* held, that a defendant who had suffered judgment by default as to part of a declaration in covenant, consisting of one count only, and pleaded to the residue, upon which issue was joined and found for him, was entitled to the costs of that issue.

(b) *Henderson v. Rumbold*, Hil. 4 Geo. 3. K.B. *Sayer's Costs*, 212. And this rule holds in B. R. where the Defendant pleads separately to different counts: as if he demur to the first count, and go to issue on the second; *Astley v. Young*, 2 Burr. 1232. or plead not guilty to the first, and a justification to the second, *Butcher v. Green*, Doug. 678. But where there are separate causes of action laid in separate counts, and the Plaintiff succeeds on some and the Defendant on others, as separate judgments must be given, each party is entitled to the costs of so much as he succeeds in. *Day v. Hanks*, 3 Term Rep. 654. In *Tempest v. Matcalf*, 1 Will. 331. a verdict having been found for the Defendant on the most material of three feigned issues, and for the Plaintiff on the other two, it was moved that the Plain-

tiff should have no costs; but the Court said, that if any one issue be found for the Plaintiff he should have his costs. By which seems to have been meant that the Plaintiff should have costs on the issues found for him, and the Defendant on the issue found for him. See also *Traithwaite v. Bradford*, 6 Term Rep. 596; though that case was partly decided on the construction of a particular statute. So if the Defendant plead a justification to a declaration consisting of one count only, and the Plaintiff traverse the justification, and also new assigns; if the Defendant suffer judgment by default on the new assignment, but obtain a verdict on the traverse, he is entitled to the costs of the issue on which he succeeds. *Griffiths v. Davies*, 8 Term Rep. 466. With respect to *Butcher v. Green*, it may be observed, that the two counts contained separate causes of action, one being in trover, and the other for words; but the case was treated as if it had been otherwise. Indeed it has been holden, that where a Defendant pleads two pleas under the statute, to the whole declaration, upon one of which judgment is given for him on demurrer, and upon the other a verdict is found against him, he shall be allowed costs on the former, but the plaintiff shall not be allowed costs on the latter, since upon the whole he has no cause of action. *Cooke v. Sayer*, 2 Burr.

mated in this Court of altering the practice, though he believed it had never been done.

Rule discharged.

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Burr. 753. But it has since been expressly laid down, that if one of several pleas pleaded under the statute be held bad on demurrer, and a verdict be given for the Defendant on the others, the Plaintiff, by the words of the 4 *Anne*, c. 16. s. 5. is entitled to the costs of the bad plea, though upon the whole record he appear to have no cause of action. *Duberly v. Page*, 2 *Term Rep.* 391. So, if the Plaintiff in replevin plead several pleas in bar under the statute, upon which several issues are taken, the avowant is entitled to the costs of the issues found for him. *Dodd v. Joddrel*, 2 *Term Rep.* 235. On both these latter points arising out of the construction of the statute of *Anne*, the practice of the *Common Pleas* agrees with that of the *King's Bench*. *Greenbow v. Ilsey* and others, *Barnes*, 136, and *Brooke v. Willet*, 2 *H. Bl.* 435. In *Greenbow v. Ilsey*, it was debated among the Judges, and held to make no difference that the demurrer on which judgment was given for the Plaintiff (who was nonsuited in the general issue) was to a plea in bar

pleaded by the defendant to a new assignment, which the Plaintiff had pleaded to one of several pleas under the statute; and in *Brooke v. Willet*, the costs given by the statute were held to extend to the trial of the issues as well as the pleading. In the *King's Bench*, however, if the Defendant obtain a verdict upon one of several pleas pleaded under the statute, and that plea prove to be bad, in consequence of which the Plaintiff having succeeded on the other pleas, is permitted to enter up judgment, the latter is allowed costs on the pleas found for him, and neither he or the defendant on the bad plea; *Kirk v. Nowell*, 1 *Term Rep.* 18. 266. in which case the reason given for not allowing costs to the Plaintiff on the bad plea also, was, that "he should have demurred to it." Indeed in such a case the provisions of the statute of *Anne*, which only entitle a Plaintiff to the costs of one of several pleas found for him on verdict or demurrer do not apply; and therefore it falls within the principle of those cases which have been decided independent of the statute.

~~WHALEY~~ v. PAJOT.

Nov. 25th.

ASSUMPSIT, on a wager.

The cause was tried before *Heath J.* at the *Guildhall* fittings after last *Trinity Term*, when the following agreement between the parties was proved: "Mr. *Pajot* bets Mr. *William Whaley* five hundred guineas and a dinner (to be had at *Sittingbourne*, in *Kent*) that his Mr. *Pajot's* brown horse, called *Little Devil*, goes from *London* to the said town in the said county of *Kent* (rode also by himself) sooner than Mr. *William Whaley's* two hacks, one a brown called *Billy*, the other a dark bay called *All-steel*, go the same distance; the two horses of Mr. *W. Whaley* to be placed at any distance from each other that he Mr. *W. Whaley* may think proper, but to be obliged, one of them, to arrive in the

No action will lie on a wager though above 50 l. that a single horse shall run on the high road from *A* to *B.* and arrive sooner than one of two horses placed at any distance the owner shall please; such a race not being legalized by 13 *Geo. 2. c. 19.*

and 18 *Geo. 2. c. 34. s. 11.* If on an agreement of this kind be indorsed "N. B. To start P. P. in fifteen days from this date," and no notice be taken of such indorsement in the declaration, and no evidence be given to explain the meaning of the letters "P. P." the Court will not, after verdict, hold it to be a variance.

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town of *Sittingbourne* sooner than Mr. *Pajot's* horse. Mr. *W. Whaley* has the power of naming his rider. The meaning of this bet is, that Mr. *Pajot* bets Mr. *W. Whaley* that his Mr. *Pajot's* horse can go the distance above mentioned in a shorter time than Mr. *W. Whaley's* horses above mentioned, placing one of them at a certain distance from the place from whence the other starts.

(Signed)

W. WHALEY,

PAJOT."

On this agreement, which was set out in the declaration, was the following indorsement: "N. B. To start P. P. in fifteen days from this date." Of this indorsement no notice was taken in the declaration, nor was any evidence given at the trial to explain the meaning of the letters "P. P." The race was won by the Plaintiff's horses, and the Jury found a verdict in his favour.

A rule *nisi* having been moved for on a former day, either to set aside this verdict, and enter a nonsuit, on the ground of a variance between the declaration and the agreement, because no notice was taken in the former of the indorsement, or to arrest the judgment on the ground of the wager being illegal, *The Court* granted a rule to shew cause in the latter shape only, saying, with respect to the former, that it was not necessary to state the indorsement, inasmuch as the letters "P. P." were merely insensible letters.

Cockell and *Shepherd* Serjts. shewed cause; and relied on the 13th of *Geo. 2. c. 19.* and 18 *Geo. 2. c. 34. s. 11.*, by the former of which acts they observed that matches for 50*l.* and upwards were legalized, provided they were run at certain places, and the horses carried certain weights, and that by the latter act the restrictions as to running at particular places and with certain weights were taken away.

Runnington and *Lens* Serjts. *contra*. Under the 16 *Car. 2. c. 19.* and 9 *Anne, c. 14.* it is very clear that this wager would be void; unless therefore it appear to be expressly legalized by 13 *Geo. 2.* and 18 *Geo. 2.* the Court cannot support it. The preambles of the two latter statutes shew that they were passed in order to prevent the excessive increase of horse-racing, and all the provisions are calculated to effect that purpose. The regulations introduced into the 13 *Geo. 2.* respecting *entering and starting, &c.* clearly prove that the horse-racing legalized by that act must be confined to horse-racing carried on in the usual manner. It is not enough that the wager depend on the speed of horses, unless that speed be exercised in the accustomed manner. In *Bidmead v. Gale*, 4 *Bur.* 2432. the

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race upon which the Plaintiff recovered was of the ordinary kind. The expression "any place or places whatsoever," employed in 18 Geo. 2. c. 34. §. 11. must for the same reason be restrained to those places where races are usually run; and indeed it would be dangerous to public safety to allow matches to be run upon the king's high-way. Even upon the letter of the eleventh (a) section, it may be contended that the penalties of the former act are only taken away as far as relates to the regulation respecting weights. In *Ximenes v. Jacques*, 6 Term Rep. 499. where the Plaintiff obtained a verdict on a wager that he could perform a certain journey in a post-chaise and pair, within a given time, the Court arrested the judgment: and though the reasons for their so doing are not stated in the report of that case, yet it may be presumed, that as the race was not of the usual kind, the Court did not consider it legalized by the acts on which these Plaintiffs now rely.

Cur. adv. vult.

On a subsequent day,

LORD ELDON Ch. J. said, The Court wishes to have this case argued again on that point, which seemed to come rather by surprise upon the Plaintiff's counsel, namely, whether this transaction, which is called a horse-race, be a match or race, within the meaning of the 13th of 18 Geo. 2. It is the more material that this question should be again discussed, because it does not appear from the report of *Ximenes v. Jacques* to have been there considered; and yet a race with a post-chaise and pair is hardly to be deemed less a race, in the popular sense of the word, than such a race as the present one on the high-road from *London to Sittingbourne*. The 16 Car. 2. c. 7. in the second section, prohibited various species of gaming, horse-racing, foot-racing, &c. under certain penalties. After this the 9 Anne, c. 14. also prohibited various species of gaming under heavier penalties, and though horse-racing was not named in that statute, yet it has been holden to come within the spirit of it (b). The 16 Car. 2. does not in terms avoid

(a) The section is, "that it shall and may be lawful for any person to run any match, or to start and run for any plate, prize, sum of money, or other thing of the real intrinsic value of 50*l.* or upwards, at any weights whatsoever, and at any place or places whatsoever without incurring or being liable to the penalty or penalties in the said act of the 13th of his Majesty's reign re-

lating to weights as aforementioned, and in the same manner as might have been done if the said act had never been made."

(b) Vid. *Goodburn v. Morley*, 2 Str. 1159. *Blaxton v. Pye*, 2 Will. 309. and *Clayton v. Jennings*, 2 Bl. 706. So also a foot-race; *Lynall v. Longbotham*, 2 Will. 36. and *Brown v. Berkeley*, Cowp. 281.

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any contract; but the transaction on which the contract is founded being prohibited, the contract itself cannot be supported. The 9 *Anne*, expressly avoids the contract. These statutes were followed by the 13 *Geo. 2. c. 19.* & 19 *Geo. 2. c. 34.* Had many contracts founded in horse-racing been held illegal previous to these statutes, it might be found difficult to maintain that such horse-racing could now be deemed legal, which before had been deemed illegal. But the 13 *Geo. 2.* having prohibited many species of horse-racing, the law seems to have implied that such species of horse-racing as were not prohibited by that statute, by not being prohibited became legal. And the 18 *Geo. 2.* having taken away some of the prohibitions and penalties of the 13 *Geo. 2.* the same kind of reasoning seems to have been applied, namely, that these species of racing with respect to which certain restrictions were taken away, were thereby altogether legalized. There seems to be much ground for arguing from the nature of the 16 *Car. 2.* & 9 *Anne*, that these acts ought to be construed strictly in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing; and that the 13 & 18 *Geo. 2.* are from their nature to be so construed as to encourage the breed of horses, and to permit that species of horse-racing only, called racing on the turf. It is to be observed, that the 13 *Geo. 2.* speaks of entering, placing, starting, &c. and that the expression "any place or places whatsoever," used in 18 *Geo. 2.* can hardly mean all *England*.

In consequence of this intimation from *the Court*, the case stood over for further argument; but on this day,

LORD ELDON Ch. J. said, Upon inquiry of the Judges of the Court of *King's Bench*, we find that the judgment of that Court in *Ximenes v. Jacques* proceeded on an opinion, that the 13 & 18 *Geo. 2.* relate to *bonâ fide* horse-racing only. Without therefore again entering into the grounds before stated, it is sufficient for me to declare it to be the opinion of the Court, that the transaction described in this case, is not that species of horse-race or match which is legalized by the 13 & 18 *Geo. 2.* and consequently that this action cannot be maintained.

Per Curiam,

Rule absolute.

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DOE ex dim. BADDAM v. ROE.

Nov. 27th.

HERWOOD Serjt. stated, that the officers objected to draw up a rule for judgment against the casual ejector on an affidavit of service, which alleged, that the declaration in ejectment was served at the dwelling-house of the tenant in possession on the tenant's wife. He cited *Doe d. Morland v. Bayliss*, 6 Term Rep. 765. to shew that the service was sufficient (a).

Service of a declaration in ejectment on the wife of the tenant in possession at his house, is sufficient.

The Court were of opinion, that the service was sufficient.

(a) Vid. etiam *Goodright ex dem. Waddington v. Thrustout*, 2 Bl. 800. *Smith ex dem. Lord Stourton and Others v. Hunt*, 1 H. Bl. 644. and what was said by Eyre Ch. J. in *Goodtitle ex dem. Read v. Badtittle*, ante, vol. 1. 384.

GOLDSMID and Others v. TAITE and Another.

Nov. 28th.

SHEPHERD Serjt. on a former day obtained a rule to shew cause why a bill of exchange should not be referred to the prothonotary to compute principal, interest, exchange, re-exchange, charges, expences and costs, or why a writ of inquiry should not be executed before the Lord Chief Justice and a special jury.

The Court will refer a bill of exchange to the prothonotary to compute principal, interest, exchange, re-exchange, and costs; but not charges and expences.

Heywood Serjt. now shewed cause and contended, that exchange and re-exchange were damages of a special nature, and ought to be ascertained by a jury, but that the Defendants ought not to be put to the expence of a special jury since a common jury was quite competent to ascertain the amount. He insisted, that it was altogether out of the province of the prothonotary to take account of charges and expences, since they could not be matter of mere computation.

Shepherd offered to strike out the words "charges and expences," but insisted, that unless the Defendants could shew that the computation of exchange and re-exchange was of sufficient consequence to require a special jury, he ought to allow it to be settled by the prothonotary. And

The Court being of this opinion, made the rule absolute for referring the bill to the prothonotary to compute principal, interest, exchange, re-exchange, and costs.

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WILTON v. PLACE.

In *C. B.* if the Plaintiff proceed to trial after money paid into Court, and the verdict is against him, he is notwithstanding entitled to costs up to the time of the money paid in.

THE Plaintiff having commenced actions against several underwriters on a policy of insurance, the Defendant in all the actions paid money into Court upon the common counts. One cause was tried and a verdict found for the Defendant. No consolidation rule had actually been entered into, but it appearing to have been the understanding of the parties that all the causes should be bound by the event of one, the Court at the instance of *Shepherd* Serjt. were about to direct the prothonotary to tax costs to the Defendant in all the causes, as well up to the time of paying the money into Court as afterwards, according to the rule laid down in *Stevenson v. Yorke*, 4 *Term Rep.* 10. *Kabell v. Hudson*, *ibid.* and *Burftall v. Horner*, 7 *Term Rep.* 372. (a)

Heywood Serjt. opposed this, and the prothonotary stated, that according to the practice of the *Common Pleas*, where money is paid into Court though the Defendant ultimately succeed in the cause when tried, yet the Plaintiff is entitled to costs till the time of the money being paid into Court.

Upon hearing this, the Court observed, that the practice as stated by the prothonotary (b) must prevail.

(a) So in *Stodhart v. Johnson*, 3 *T. R.* 657. where the Plaintiff proceeded to trial and a juror was withdrawn, he was held not to be entitled to costs up to the time of paying the money into Court. But in *Seymour v. Bridge*, 8 *Term Rep.* 408. where the Plaintiff having given notice of trial, neither entered his cause, or countermanded the notice, but took the money out of Court, he was allowed costs up to the time of the money being paid in, though the Defendant was entitled to judgment as in case of a nonsuit. And in *Lorck v. Wright*, 8 *Term Rep.* 486. the same principle was held to apply, where the plaintiff twice carried the record down to trial and withdrew it. The rule that a Plaintiff is entitled to costs up to the time of paying money into Court was laid down in *Hartley v. Bateson*, *K. B.* 1 *Term Rep.* 629. where the Plaintiff had proceeded after the money paid in, but had not gone to trial: and

though in *Griffiths v. Williams*, 1 *Term Rep.* 10. that rule was extended to the case of a Plaintiff who proceeded to trial, and obtained a verdict for the exact sum paid into Court only, yet in *Stevenson v. Yorke*, 4 *Term Rep.* 10. *Buller* J. observed that "that part of the case of *Griffiths v. Williams* could not be supported."

(b) See *Savage v. Franklyn*, *Barnes* 280. *Davis v. Maunsell*, *Barnes* 282. *Vane v. Mcchell*, *Barnes* 284. and *Bate v. Crane*, *Barnes* 287. where costs up to the time of paying the money into Court were allowed to the Plaintiff by the Court of *C. B.*; but it is to be observed, that in none of those cases had the Plaintiff proceeded to trial; and in *Davis v. Maunsell*, as reported in *Willes* 191. *Fortescue Aland* J. says, the Plaintiff may take out the money at any time before trial, and will be entitled to costs till the time of the money brought in.

C A S E S

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ARGUED AND DETERMINED

IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Fortieth Year of the Reign of GEORGE III.

RÜDCEVS v. LACY.

Jan. 26th.

THIS was an action brought by the Plaintiff as a seaman, against the Defendant who was captain of the ship *Suffolk* for wages earned on a voyage from *Savannalamar* in *Jamaica*, to this country. The cause was tried before Lord *Eldon* Ch. J. at the *Westminster* sittings after last *Michaelmas* Term, when the following facts appeared in evidence: The Defendant being in great want of hands to navigate the ship home, and being restricted by the 37 *Geo. 3. c. 73. s. 3.* (a) from engaging any seamen in the

The 37 *G. 3. c. 73. s. 3.* having prohibited more than double monthly wages being given to seamen coming from the *West Indies*, unless the captain be specially licensed to give a greater rate by the chief officer of the port, a general licence by such chief officer to a captain, "to procure men on such terms as he can," is void.

West

(a) That section enacts that no master or commander of any *British* ship which shall sail for any port in *Great Britain* shall hire or engage any seaman, mariner, or other person at any port or place within his Majesty's colonies or plantations in the *West Indies*, to serve on board any such ship at

for greater or more wages or hire for such service, than according to the rate of double monthly wages; unless the governor, chief magistrate, collector, or comptroller of such port or place shall think that more ought to be given, and do and shall accordingly authorize and direct the same to be given

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West Indies at more than double monthly wages, unless the governor or other chief officer of the port should authorise him so to do under his hand, applied to the chief magistrate of the place where he was for such a permission, and obtained the following one: "*Jamaica, parish Westmoreland—Whereas it appears to me G. M. Esq. Custos Rotulorum and chief magistrate in and for the parish of Westmoreland by the oath of L. Lacy master of the ship Suffolk now lying at anchor in the harbour of Savannahamar in the said parish and bound thence to the port of London in the kingdom of Great Britain that he cannot engage seamen to carry his said ship home at the rate allowed by law. These are therefore to license and permit the said L. Lacy to procure men on such terms as he can to navigate his said ship now loaded and ready to depart with the convoy for Britain. Witness my Hand, &c. &c.*"

Under this licence the Defendant engaged the present Plaintiff, agreeing to give him forty-five guineas at that time, (which was paid,) and 9*l.* per month during the voyage, with half a pint of rum per day, and coffee night and morning. On the part of the Defendant it was objected, that the Plaintiff could not recover upon the above agreement, inasmuch as the sum agreed for was above the rate of double monthly wages, and the contract having been made under a general licence to the captain to give according to his discretion, instead of a licence regulating the precise sum, was therefore void. His Lordship being of opinion that it was the intention of the legislature, with a view to prevent exorbitant wages being given, to deprive both the master and the mariner in such cases of the power of exercising their discretion, and to place the regulation of the price of wages in the hands of the chief officer of the port, who ought therefore to specify in the licence the rate of wages allowed by him, nonsuited the Plaintiff, with liberty to move the Court for a verdict in his favour on the contract as proved.

Cockell Serjt. now moved for a rule *Nisi* to set aside this nonsuit, and contended that the licence was sufficient within the meaning

given by writing under his hand; that then and in such case the master and commander shall be at liberty to pay and the seamen to receive such greater or higher wages as such governor, &c. shall direct as aforesaid; (his Lordship took notice of these latter words

as evidencing the intent of the legislature beyond all doubt;) and all contracts, bonds, &c. contrary to the meaning of the act, shall be null and void, and the master of such ship entering into such contract shall forfeit 100*l.*

of the act, the chief magistrate having, under the existing circumstances, felt it impossible to fix the rate of wages himself.

But the *Court* were clearly of opinion both on the policy and letter of the act, that the nonsuit was right, and that if it were otherwise every chief magistrate in the ports of the *West India* islands would have it in his power to annul the act.

Cockell took nothing by his motion.

KIDD v. RAWLINSON.

Jan. 27th.

THIS was an action for money had and received.

An execution having issued against the goods of one *Aburn*, who kept a public house, his furniture was taken and put up to sale by the Sheriff of *Surry*; the Plaintiff, who was *Aburn*'s brother-in-law, but not a creditor, became the purchaser, and a bill of sale was made out to him, dated 13th of *November* 1798; *Aburn* was by him permitted to continue in possession of the goods in order that he might be able to carry on his business, but being soon after taken in execution and committed to prison, he executed a bill of sale of them, dated 11th of *March* 1799, to the Defendant, to whom he was indebted in the sum of 16*l.* 5*s.*; the Defendant having taken possession under this last bill of sale, received a notice from the Plaintiff not to dispose of the goods, stating his prior title; on the 14th of *March* the landlord of the premises authorised the Defendant to distrain to the amount of 12*l.* 10*s.* for rent due from *Aburn* for two quarters, which the Defendant accordingly paid, and on the 26th of the same month sold the goods for 26*l.* 14*s.* 6*d.* The expences of the bill of sale to the Defendant, of keeping possession, and of the auction added to the rent advanced by the Defendant, amounted to 26*l.* 4*s.* 8*d.*; leaving a balance of 9*s.* 8*d.*; this being deducted from the debt due from *Aburn* to the Defendant, the latter still remained a creditor of the former for 15*l.* 15*s.* 4*d.* The cause being tried before Lord *Eldon* Ch. J. at the *Westminster* sittings after last *Michaelmas* Term, his Lordship put it to the jury to say, Whether the Plaintiff had purchased the goods with a view to defeat any execution by any of the creditors of *Aburn*? And the jury being of opinion that the purchase was not made with that view, gave him a verdict for 14*l.* 4*s.* 6*d.*

Marshall Serjt. now moved for a rule *Nisi* to set aside this verdict and enter a nonsuit: he contended that the bill of sale to the Plaintiff

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The goods of *A.* being taken in execution and put up to sale, *B.* became the purchaser and took a bill of sale of the sheriff, but permitted *A.* to continue in possession; *A.* then executed another bill of sale of the same goods to *C.* a creditor, under which the latter took possession; whereupon *A.* brought an action against *C.* for the goods. Held, that the first bill of sale was valid, and that *A.* was therefore entitled to recover.

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Plaintiff not having been accomplished and followed by possession, was fraudulent and void, and cited *Edwards v. Harben*, 2 Term Rep. 587. and *Bamford v. Baron* in a note to that case.

Lord ELDON Ch. J. This action was brought to recover the produce of the sale made by the Defendant after deducting the amount of the rent paid to the landlord. It is to be observed that the Plaintiff was not a creditor of *Aburn*, and did not buy the goods as the means of satisfying any debt of his own; nor indeed could he, for the Sheriff was to receive the money produced by the sale: nor was the purchase made with a view to defeat creditors, but out of mere kindness to *Aburn* to whom the Plaintiff was related. If, under these circumstances, the possession of *Aburn* be sufficient to make the bill of sale fraudulent, the Plaintiff must suffer the legal consequences of his benevolent disposition. But it appears to me that this does not fall within the principle of *Twyne's (a)* case, and the other cases on this subject, where the parties stood in the relation of debtor and creditor, and where their object was to defeat the other creditors. This seems to me a new case; for here the goods were purchased at a public sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose. If *Kidd* had lent money to *Aburn* to buy these goods, and had then taken a conveyance of them, or a security for his debt thus arising out of the mere act of lending the money; leaving *Aburn* in possession of the goods would not have been a fraudulent act. This appears from Mr. J. Buller's *Law of Nisi Prius*, p. 258., who after stating a case of conveyance which was holden to be fraudulent because the donor continued in possession, adds, "but yet the donor continuing in possession is not in all cases a mark of fraud; as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money." It will be difficult to distinguish the transaction in question from this case. Indeed a public buying of the Sheriff seems to be more favourable to the Plaintiff. It appeared to me at the trial that *Kidd* might be considered as the donee of these goods lending money to *Aburn* to purchase them through the medium of the Sheriff, and taking a bill of sale as a security for the money. I desired the jury to say what they considered to be the object of the bill of sale; and they were of opinion that it was the intention of the parties that the bill of sale should be a security for the money advanced to the Sheriff.

HEATH J. I see no reason for setting aside this verdict. The case is clearly distinguishable from *Twyne's* case, there being great notoriety in the whole of this transaction. Now it is to be observed, that Lord *Coke* in *Twyne's* case recommends that gifts in satisfaction of a debt by one who is indebted to others also, should be made in a public manner before the neighbours and not in private; for secrecy is a mark of fraud. Here there was no fraud or secrecy, and therefore I think the consequences would be mischievous if this Plaintiff's title were defeated.

ROOKE J. I am of the same opinion.

Marshall took nothing by his motion.

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ENGLISH v. DARLEY.

Jan. 27th.

ASSUMPSIT by the indorsee of a bill of exchange against the indorser.

Lord *Eldon* Ch. J. before whom the cause was tried at the *Westminster* sittings after last *Michaelmas* Term, nonsuited the Plaintiff under the following circumstances: Payment of the bill being refused when due, the Plaintiff commenced actions against the present Defendant and the acceptor, and having sued the latter to judgment, took out execution thereon; but although the acceptor had sufficient to answer the execution, the Plaintiff at his instance received 100*l.* in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together with interest and costs, excepting only a nominal sum, with a view to enable him, the Plaintiff, to support actions against the other parties to the bill.

If the indorsee of a bill having sued the acceptor to judgment, and taken out execution, receive of him a sum of money in part payment, and take his security for the remainder, with the exception of a nominal sum only; he is thereby precluded from afterwards suing the indorser.

Shepherd and *Lens* Serjts. now moved for a new trial, and contended that the holder of a bill of exchange after due notice given of non-payment is entitled to sue all or any of the parties whose names are on the bill; and that although he receive from any one of them what may amount to a satisfaction as against him, yet that the others will not be discharged until the whole amount of the bill be paid; as in *Macdonald v. Bovington*, 4 *Term Rep.* 825. where the holder of a bill having sued the acceptor and charged him in execution, he was allowed to sue the drawer on the acceptor being discharged by an insolvent act; and in *Hayling v. Mulhall*, 2 *Bl.* 1235. where it was laid down that the holder after having discharged one of the indorsers, whom he had taken in execution,

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by a letter of licence, might sue a prior indorser. They insisted that each of the parties to the bill was in the nature of a co-surety, and therefore nothing short of actual payment by one of them could be considered as a satisfaction in an action against any of the others, and cited *Dyke v. Mercer*, 2 Show. 394.

LORD ELDON Ch. J. It is very clear that the holder of a bill may at his election sue any or all the parties to it, and that if they all become bankrupt, he may prove against the estates of all unless he receive part of the debt from any one. And although the debt be reduced from time to time by dividends, no part of the proof shall be expunged under any of the commissions till 20s. in the pound have been received. As long as the holder is passive, all his remedies remain; and if any of the parties be discharged by the act of law, as by an insolvent debtors' act, that operation of law shall not prejudice the holder. With respect to *Hayling v. Mulhall*, it may be observed that the marginal abstract of that case is incorrect; for it appears from the report that the person first sued was a subsequent indorser: had the Plaintiff first sued a prior indorser and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser. If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, (the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Ex parte Smith* (a) Lord *Tburlow*, after consulting with all the Judges, was of opinion that the holder of a bill by entering into a composition with the acceptor discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptor's liability being varied by the act of the holder. We all remember the case where Mr. *Richard Burke* being co-surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. *Burke* was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the co-surety, because he must by so doing enforce a payment from the principal contrary to the agreement. Here the Plaintiff having taken a new security from the acceptor, has discharged the Defendant.

HEATH and ROOKE Js. were of the same opinion.

Shepherd and *Lens* took nothing by their motion.

(a) Co. B. L. 168. 172. Ed. 4.

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WILLIAMSON v. BUTTERFIELD and Another, Executors
of J. BRALEY.

Jan. 29th.

COVENANT. The declaration stated, that *J. Braley* in his lifetime was possessed of a certain lease of certain marsh lands and tenements, of which at the time of making the after-mentioned indenture there were eight years then to come and unexpired; that an indenture was entered into between *C. Williamson* (the Plaintiff) of the first part, the said *J. Braley* of the second part, and one *J. Morgan* of the third part, which after reciting that *C. Williamson* and *J. Braley* were desirous of making some provision for the support of *Mary Williamson*, the wife of *James Williamson*, who had left her and gone abroad, (she being the sister of the said *J. Braley* and sister in law of the said *C. Williamson*;) and also for the maintenance and education of her children by the said *James Williamson*, and therefore that *C. Williamson* had offered and agreed to allow 30*l.* per annum during his life, and to leave at his death 600*l.* for the same purpose, and the interest of which should be applied in lieu of the 30*l.* per annum, and that *J. Braley* had also agreed to allow 20*l.* per annum during his life in case *C. Williamson* the younger should continue to live with him or be kept at school, and found and provided by him with board and other necessaries, but if he should cease to live with him and quit him with his consent, then *J. Braley* agreed to allow 35*l.* per annum; And reciting that *C. Williamson* and *John Braley* for carrying into execution their intentions, and securing payment of the said sums, bound themselves to *J. Morgan* in 1200*l.* with conditions to perform all the covenants thereafter mentioned; witnessed, That *C. Williamson* covenanted with *J. Morgan* to perform his part of the above-mentioned agreements, and that *J. Morgan* should receive the said sums allowed by *C. Williamson* as aforesaid, upon the trusts declared concerning the same (which were adapted to carry into effect the agreement above-mentioned); and that *J. Braley* also covenanted with *J. Morgan* to perform his part of the above-mentioned agreement in the same manner; And lastly, that it was agreed by all the parties that in case *Mary Williamson* should misbehave herself to the disapprobation of *C. Williamson* and *J. Braley* it should be lawful for *J. Morgan*, his executors or administrators, on the same being signified to him by *C. Williamson* and *J. Braley*,

A. being possessed of a lease for years, covenanted in an indenture for making a family provision, that if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue to *B.*; *A.* afterwards purchased the reversion in fee and died; Held, that *A.* did not by the terms of the covenant intend to preclude himself from purchasing the fee, and therefore his executors were not liable upon that covenant.

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to apply the above sums for the maintenance of the children only, in such manner as *C. Williamson* and *J. Braley* should direct; That after further reciting “that it had been agreed by and between the said *J. Braley* and *C. Williamson*, that in case he the said *J. Braley* should happen to die during the continuance of the term of the lease, under which the said *J. Braley* then held the marshes in the parish of *Laindon*, in the county of *Essex*, called *Bishop’s Lands*, that his executors or administrators should immediately thereupon deliver the possession thereof, and assign the residue of such term unto the said *C. Williamson*, his executors, administrators, and assigns, and that from thenceforth he the said *C. Williamson* should pay to the said *John Morgan*, his executors or administrators, the further yearly sum of 30*l.* during the continuance of the said term upon the trusts therein-before mentioned, the said *J. Braley* did thereby covenant and agree to and with the said *C. Williamson*, that in case of his said dying as aforesaid, his executors or administrators should immediately, and he the said *J. Braley* did thereby direct them to deliver immediate possession to the said *C. Williamson* of the said marshes, and to assign to him, his executors, administrators, and assigns, the lease under which he held the same for the residue then to come of the term thereby granted; and the said *C. Williamson* in consideration thereof did thereby covenant, promise, and agree to pay or cause to be paid unto the said *J. Morgan* the further yearly sum of 30*l.* of like lawful money of *Great Britain* during the continuance of the said term of the said lease, to, for, and upon the several trusts, intents, and purposes therein before mentioned. And it was thereby mutually agreed between the said *J. Braley* and *C. Williamson*, that if the said *C. Williamson* should in the life-time of the said *J. Braley* purchase the said land, that the said *J. Braley* should continue tenant thereof during his life at the same rent he then held the same.” The declaration then averred the death of *J. Braley*, and the appointment of the Defendants as his executors, the performance by *C. Williamson* of his part of the covenants, and a demand made by him upon the Defendants to deliver up immediate possession of, and assign to him the lease under which they were held, and a refusal by them so to do.

Plea that *J. Braley* after the making of the indenture in the declaration mentioned, and during the continuance of the said term, purchased the reversion in fee,” Whereby the said lease in the said declaration mentioned, then and there became void, and the

said term thereby granted, and in the said declaration mentioned, then and there became, and was and still is merged, surrendered, and extinct in law. And the Defendants as executors aforesaid, by reason thereof, could not upon the death of the said *J. Braley* deliver immediate possession, nor have they as such executors at any time since been able or capable of delivering possession, nor can they now deliver possession of the said marshes and tenements in the said declaration mentioned, or assign the residue of the said term by the said lease granted unto the said Plaintiff, his executors, administrators, or assigns, according to the form and effect of the said indenture in the said declaration mentioned, and of the covenant of the said *J. Braley* deceased, in that behalf made as aforesaid. And this," &c.

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To this there was a general demurrer and joinder therein.

When this case first came before the Court, no part of the indenture now set out in the declaration, except the covenant of *J. Braley* that his executors should assign, appeared on the record. The declaration then contained a second breach, which stated that *J. Braley* in his life-time purchased the whole estate, whereby his executors were unable to assign any residue to the Plaintiff. To this breach the Defendant had demurred.

In support of which demurrer, *Shepherd* Serjt. in last *Michaelmas* term contended, that the clear meaning of the covenant was, that if the covenantor should happen to die possessed of the term, his executors should assign to the Plaintiff; but that as the covenantor had purchased the reversion in fee in his life-time, he did not die possessed of the term, and therefore his executors were excused; and observed, that the words "in case of his said dying as aforesaid," must be construed, in case of his dying as mentioned in the former part of the deed. He cited *Walter v. Montague*, 2 *Roll. Rep.* 332.

Sellon Serjt. *contra* insisted, that where a man creates a charge upon himself by his own contract, nothing can relieve him from it, much less an act of his own. He cited *Sir A. Mayne's* case, 5 *Co.* 20. *Cro. Eliz.* 479. *S. C. Paladine v. Jane, Alleyn*, 26. *Earl of Chesterfield v. Duke of Bolton*, *Com.* 627. *Bullock v. Dommitt*, 6 *Term Rep.* 650. *Brecknock Company v. Pritchard*, 6 *Term Rep.* 750. *Doe d. Mitchenson v. Carter*, 8 *Term Rep.* 300.

The Court thinking the whole deed material to the construction of the covenant in question, ordered the parties to amend.

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Accordingly the deed being set forth in the declaration, and the second breach and demurrer thereto being struck out, the case now came on to be argued on the demurrer to the plea.

Sellon in support of that demurrer. This is a conditional covenant, that the executors of the covenantor shall do a certain act in case he die during the continuance of the term of the lease; and for the Defendants it is contended that he did not die during the continuance of that term. The word "term" may be taken in two senses, either as a limitation of time for which the estate is to continue, or as the estate itself. *Sheph. Touch. c. 14. p. 267. Ed. 1651.* The former, however, is the more usual acceptation of the word, and the only one to be found in most of the law dictionaries. In this case the words that precede and follow it shew that it was used in the common sense. Had the expressions been "during the term," or "during the lease," they might have been considered as describing the estate, but the words "during the continuance of the term of the lease," can bear no other sense than during the continuance of the time which the lease has to run. The object of the covenant was to make a provision for *Mary Williamson*; and *C. Williamson*, in consideration of having this term assigned to him by *J. Braley's* executors, undertook to allow her a certain sum after *J. Braley's* death as long as the term lasted. Now if *J. Braley* had it in his power to defeat the covenant, he had it in his power thereby to deprive *Mary Williamson* of the provision intended for her. A stipulation is inserted in the deed in the case of *C. Williamson* purchasing the fee of these premises, that *J. Braley* shall continue to hold them as tenant, but no stipulation is made in case of its being purchased by *J. Braley*; it is therefore to be inferred that the parties did not intend that *J. Braley* should be at liberty to purchase the fee. If on the other hand it be urged that the Plaintiff should have provided for this event by a covenant, it may be observed, that *J. Braley* was the covenantor, and that all omissions must be taken most strongly against him. (He was then proceeding to argue that it was not in the power of *J. Braley* to defeat the covenant by his own act, but the Court interfered, and stopped *Shepherd* who was on the other side).

LORD ELDON Ch. J. The second point to which my Brother *Sellon* was proceeding assumes the meaning of this covenant to be, that if *J. Braley* should die within the number of years unexpired at the time when the covenant was made, his executors should

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assign the residue to *C. Williamson*. On this head an important question might arise, Whether, considering the purchase as the act of *J. Braley*, he could defeat the covenant so understood? I should have no difficulty in saying that he could not, because it would be incompetent to him to say that he did not mean *C. Williamson* to have the benefit of so many years as should be unexpired at his death. The Court can only collect the meaning of the parties from what is expressed upon the deed, and the undertaking of the covenantor must be made good according to the terms of the covenant. If the import of the instrument be, that on the supposition of the term existing under the lease at the time of his death, then if he so die during the term so existing under that lease, it shall be assigned to *C. Williamson*, whatever may have been the meaning of the parties; the Court must not indulge in conjecture, but must put that construction on the covenant which is warranted by the terms of the deed. It does seem to me, however, that the terms of the instrument have done justice to the intent of the parties. *J. Braley* meant, that if he died possessed of the term under the lease, *C. Williamson* should take the residue of that term; but I find nothing in the deed which calls upon the Court to say that *J. Braley*, who was giving a benefit to the children, might not put an end to the term, and provide for the children in any other way that he pleased. The circumstance of *C. Williamson* having entered into a covenant in case of his purchasing the reversion, affords strong ground to infer that *Braley* did not mean to bind himself to any thing in case it should be purchased by him. And are we to imply between parties covenanting with each other, that their covenants were intended to extend to a case not expressed in terms, merely because it is not so expressed? It is observable that *Braley* covenants that in case he should die during the continuance of the term, his executors and administrators, who would be the persons representing him in respect of his interest in this term, should assign the residue to *Williamson*: saying nothing of the heir upon whom the interest would devolve in case he should purchase the fee. The covenant further states, that the executors and administrators "shall deliver immediate possession to the said *C. Williamson* of the said marshes, and assign to him his heirs, &c. the lease under which he (*Braley*) held the same, for the residue then to come of the term thereby granted." This supposes a term and interest subsisting which may be availably assigned. *J. Braley* having a certain interest in the marshes, and it being competent to

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him to purchase the whole fee, *C. Williamson* covenanted to make certain additional provisions for *M. Williamson* and her children, in case the term should be assigned to him, and as long as it should last. He therefore has no reasonable cause of complaint, since his obligation only arises from the time of the term being assigned to him. In fact, *J. Braley* seems to have been anxious to secure to himself the tenancy of the premises at all events, but to have avoided saying that he would not purchase a larger interest. If the parties to a deed will not express their intentions, the Court cannot by construction insert a provision, however well satisfied they may be that the parties ought to have provided for any particular event.

HEATH J. I am of the same opinion. In construing covenants the Court cannot extend them beyond their natural import. It has been said that the object of the covenant was to provide for *M. Williamson* and her children, and that unless the construction contended for by the Plaintiff be adopted the covenant will be ineffectual. But it appears to me to have been matter of mutual accommodation. It was agreed, that if *C. Williamson* should purchase the fee, the lease should be continued to *J. Braley* during his life, and that if *J. Braley* should die during the continuance of the lease, the residue should be assigned to *C. Williamson*. But it does not appear that he intended to preclude himself from purchasing the reversion: and it would be strange to draw a conclusion to that effect from the omission of any covenant respecting it. Then it is argued that it was not competent to him to defeat his covenant by his own act. But if a man convey a defeasible interest, there is no reason why he should not defeat that interest. Thus, if a rector of a parish grant an annuity chargeable on his living, and enter into no covenant, if he surrender his living the next day, the grantee will be defeated. That case seems to me similar to the present.

ROOKE J. I am of the same opinion.

Judgment for the Defendants.

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Feb. 1st.

MARTIN v. KENNEDY.

BANNING v. PERRY.

THE defendant *Kennedy* being the printer, and *Perry* the proprietor of a newspaper called *The Morning Chronicle*, the present Plaintiffs brought actions against them and *Lambert* the publisher for two libellous advertisements: *Martin* first sued *Perry* the proprietor, and *Banning* sued *Kennedy* the printer: in both these actions judgment was suffered by default; and writs of inquiry being executed, 40*s.* were recovered in the former, and 5*l.* in the latter. Each of the plaintiffs then sued *Lambert* the publisher, and judgment having been suffered by default in these actions also, and writs of inquiry executed, a farthing only was given in each case. After this the present actions were commenced, *Martin* suing *Kennedy* the printer, and *Banning* suing *Perry* the proprietor. The same attorney was employed by the plaintiffs in all the actions.

Bayley Serjt. on a former day moved for a rule calling on the Plaintiff to shew cause why the proceedings in these two last actions should not be set aside with costs, and cited *Bird v. Randall*, 3 *Burr.* 1345, and 1 *Bl.* 387. S. C.

The Court granted the rule *nisi* but expressed great doubts respecting the success of the application.

Shepherd Serjt. now shewed cause. If the Plaintiffs in these actions have received that which amounts to a satisfaction in law, the Defendants may put that fact upon the record as a defence: so if two actions be brought for the same cause, a Defendant may plead in abatement of one that the other is pending; and if the second be brought after judgment obtained in the first, that judgment may be pleaded in bar. But neither of the above cases affords any ground for an application to stay proceedings in a summary way. The Court never interferes in that manner unless it be to prevent an abuse of its process. Thus, where trespass has been committed by two, and the Plaintiff having already brought an action against one, commences another action against both, the Court will interfere: not on the ground of satisfaction having been received by the plaintiff, but because one of the Defendants has already been sued.

Bayley in support of the rule. The plaintiffs having recovered a complete satisfaction for the act of publication of which they now complain, the Court may interfere without driving the

If A. and B. having recovered in separate actions for libels against different parties engaged in the management and publication of the same newspaper, commence fresh actions against the same parties, each suing that party against whom the other has recovered, the Court will not interfere in a summary way to set aside the latter proceedings.

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Defendants to plead it. That the act of publication now complained of is the same act for which the Plaintiffs have already sued, appears both upon the declarations and upon the affidavits in answer to the rule. In the latter the Plaintiffs insist that they have not recovered an adequate satisfaction; not that any new or distinct act of publication has taken place. In *Bird v. Randall*, which was an action on the case for seducing a servant out of the Plaintiff's service, the Plaintiff having previously recovered from the servant the penalty in which he had bound himself by articles, the Court held that the action could not be supported; and Lord Mansfield in the conclusion of his judgment said: "My Brother *Dennison* suggests to me that the Court would, upon the application of the present Defendant, *by way of motion*, have stayed the Plaintiff's proceeding further against him, upon the Defendant's shewing them that the Plaintiff had actually received the money recovered by him in his former action against the servant." In *Com. Dig.* tit. *Action*, (K. 4), a distinction is taken between damages certain and uncertain, and it is there said that in the latter case a recovery and execution against one of several is a bar to an action against any of the others; as in trover against *J. S.* for the same goods for which the plaintiff had already sued another to judgment and execution. *Broome v. Wootton*, *Yelv.* 67. *Cro. Jac.* 73. *S. C.* (a); and the same in trespass, *Lendall v. Pinfold*, 1 *Leon.* 19. *Anon.* 3 *Leon.* 122. *Litt. pl.* 376. (b); and in *Cocke v. Jennor*, *Hob.* 66. it was laid down, that if several defendants in trespass be sued in several actions, though the plaintiff make choice of the best damage, yet when the plaintiff hath taken one satisfaction he can take no more; and if he require two, an *auditâ querelâ* will lie. Now, wherever a party is entitled to an *auditâ querelâ*, the Court will relieve in a summary way.

Lord ELDON Ch. J. Though every attempt to shorten litigation is entitled to the favour of the Court, yet before we stop a party in a regular course of proceeding, we ought to be certain that we shall not deprive him of that justice which the law authorizes him to seek. There are certainly many cases in which it is held that a party is not entitled to maintain different actions for the same cause. But the present application in fact amounts to this: the Defendant, instead of putting that upon the record which may or may not be a good defence, applies to the Court by affidavit to compel the Plaintiff to disclose the evidence upon which he means

(a) *Vide etiam Morton's Case*, *Cro. Eliz.* 30.

(b) *Vide etiam Sir Humphrey Ferrers and Others, v. Archer*, *Cro. Eliz.* 667.

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to go to trial. In actions of trespass for taking away posts, or destroying grass in a field, where several persons are concerned, the amount of the injury sustained is ascertained by the very nature of the act: and when a compensation in damages has been once received, the Court may very reasonably prevent the plaintiff from seeking the same compensation a second time. In *Bird v. Randall* no summary application was either made or granted. The test laid down in *Kitchen v. Campbell*, 3 Wils. 308. 2 Bl. 831. S. C. by which it may be ascertained where a recovery in one action is a bar to another, is this, *viz.* where the same evidence will support both the actions. At any rate the present case differs materially from all which have been cited, because the injury done is an injury to character. Now character will be affected according to the extent of the circulation of the libel; and the injury may be very different according to the manner in which it is committed: the damage sustained will be much varied, whether the libel be published in a coffee-house at *York* among persons with whom it is peculiarly the interest of the plaintiff to stand well in point of character, or in some other place where it is of less importance. So the person who disperses the libel as a mere agent, and the principal himself, ought to suffer in very different degrees, because the former is comparatively innocent. We must be very sure of our ground before we stop a party in this stage of the proceedings; since we must do it at the peril of being right, as we thereby prevent him from producing any evidence to shew that the causes of action were essentially different, and deprive him of his writ of error.

HEATH J. I am of the same opinion. It is clear that if a satisfaction has been recovered the plaintiff may avail himself of that circumstance in some way or other. He may plead it or give it in evidence; or if the satisfaction has been obtained after trial, perhaps the Court might interfere in a summary way and not put the party to his *audita querela*. But it was never known that because a recovery has been had the Court will stop the proceedings *in limine*. Suppose a defendant to have taken the Plaintiff's receipt, and the latter to declare for goods sold and delivered; the Court could not interfere to stay proceedings, for that would be trying the question in a summary way. I only understand Mr. Justice Dennison to have said in *Bird v. Randall*, that if the party has no other remedy the Court will do him justice.

ROOKE J. There is no doubt that the Court in many cases will relieve on motion, where different actions are brought for the same cause,

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cause, instead of putting the party to plead. But this case is of a peculiar sort, and not like trespass, where the precise injury is ascertained by the act itself. The damage arising from a libel depends much upon the mode of its publication. The cases cited, therefore, do not apply.

Rule Discharged with costs.

Feb. 4th.

DAVIS and Others v. DAVENPORT.

The Court will not discharge a defendant out of custody on the ground of the affidavit of delivery of the declaration, not having been filed within 20 days of the delivery, if it be by way of detainer.

ON a former day *Runnington* Serjt. moved to discharge the Defendant in this action out of the custody of the warden of the *Fleet* on entering a common appearance. The ground of the application was, that the affidavit of the delivery of the declaration was not filed in due time, according to the rule of *E. 5 Will. & Mar. Reg. 2.*; the declaration itself having been delivered by way of detainer on the 3d of *January* as of *Michaelmas* Term, and the affidavit of the delivery not having been filed until the 24th of that month, whereas by the rule it is required to be filed within twenty days of the delivery.

The Court finding, upon inquiry from the officers, that in practice the rule was not held to extend to the case of a declaration delivered by way of detainer, refused a rule *nisi*.

On this day *Runnington* mentioned it again, and cited *Impey's Prac. C. B.* 689. and 694. *ed.* 4. and referred to the case of *Pagar v. Hadgely* in the former page:

But the Court abiding by the opinion of the officers, he took nothing by his motion.

Feb. 4th.

THYATT v. YOUNG.

The Court will not allow *non assumpsit* and alien enemy to be pleaded together.

BEST Serjt. shewed cause against a rule *nisi* obtained on a former day for pleading the several matters of *non assumpsit* and alien enemy; and relied on *Feron v. Ladd*, 2 *Bl.* 1326. and *Angerstein v. Vaughan*, *ante*, vol. 1. p. 222. *in notis*.

Heywood Serjt. *contra* urged that as the Defendant might give in evidence under the general issue that the Plaintiff was alien enemy, there could be no objection to allowing him to put it on record together with *non assumpsit*; and compared the plea of alien enemy to the pleas of infancy and coverture.

But the Court refused to allow the application.

Per Curiam,

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Rule Discharged.

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PARKER v. BAYLIS and Wife.

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“*W*ILLIAM Baylis and Mary his wife, which said Mary is the administratrix with the will annexed of all and singular the goods and chattels, rights and credits which were of *Eliz. Stattard* deceased at the time of her death which remain unpaid and unsatisfied, were attached to answer unto *John Parker &c.* For that whereas before and at the time of the making of the promise and undertaking of the said *William* and *Mary* his wife hereinafter next mentioned, the said *John* was beneficially interested in and entitled to a certain large quantity (that is to say) 533*l.* 6*s.* 8*d.* of a certain stock or fund commonly called the 3 per cent. *South Sea Annuities*, then standing and being in the books of the *South Sea Company* in the name of the aforesaid *Elizabeth Stattard* deceased, to which said *Elizabeth Stattard* deceased the said *Mary* the wife of the said *William* was the next of kin then surviving; on which said stock or fund certain dividends were then and there due in arrear and unpaid to which said dividends the said *John* was also then and there entitled; and whereas in order to obtain payment of the said dividends it became and was necessary, according to the practice of the said *South Sea Company*, that application for such payment of the dividends which were so in arrear should be made by and on the behalf of the executors or administrators of the said *Elizabeth Stattard* deceased, in whose name the said stock or funds then stood in the books of the said *South Sea Company*, of all which premises the said *William* and *Mary* his wife had due notice; and thereupon heretofore, to wit, on, &c. in consideration that the said *John*, at the special instance and request of them the said *William* and *Mary* his wife, had procured administration to be granted to the said *Mary* the wife of the said *William* as the surviving residuary legatee of the said *Elizabeth Stattard* deceased, with the will annexed of the unadministered goods of the said *Elizabeth Stattard*, for the purpose of obtaining by their means and medium payment of the said dividends so in arrear as aforesaid, unto and to the use of him the said *John*, and had agreed to bear, pay, and discharge all the expences of obtaining such administration as aforesaid, they the said *William* and *Mary* his wife, so being such administratrix as aforesaid, undertook and then and there faithfully promised the said *John* that as soon as the payment of the dividends then due and in arrear as aforesaid should be obtained by them, that they the said *William* and *Mary* his wife, administratrix as aforesaid,

A. declared against B. and his wife administratrix of C. deceased: For that whereas C. died intestate, possessed of *South Sea Stock* which she held in trust for A. and upon which certain dividends were due, in consideration that A. at his own expence would procure administration to be granted to the wife of B. as next of kin to C. and would furnish evidence to enable B. and his wife to receive the dividends; B. and his wife as such administratrix promised to pay over to B. the amount of the dividends when received. Held, that the consideration stated was insufficient to support the promise. Held also, that as the dividends never made part of the intestate's estate, the action against B. and his wife as administratrix could not be maintained.

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would pay the amount of the said dividends to him the said *John* when they the said *William* and *Mary* his wife, administratrix as aforesaid, should be thereto afterwards requested. And the said *John* avers that he the said *John* having at his own proper costs and charges so obtained and procured such administration to be granted to the said *Mary* the wife of the said *William* for the purpose of obtaining by the means and medium of him the said *William* and *Mary* his wife, as such administratrix, payment of the said dividends so in arrear as aforesaid to be made to and to the use of him the said *John*, and the said *Mary* the wife of the said *William*, by and with the consent, privity, and authority of the said *William*, having accepted and taken upon herself the burthen of such administration for the purpose aforesaid, they the said *William* and *Mary* his wife, as such administratrix as aforesaid, afterwards and after such administration was so obtained and procured for and granted to the said *Mary* the wife of the said *William* aforesaid, to wit, on, &c. at, &c. obtained, procured, and received payment of the said dividends then due and in arrear on the said stock or fund as aforesaid to a great and considerable amount, to wit, to the amount of 500*l.* of lawful money of *Great Britain*, yet the said *William* and *Mary* his wife, administratrix as aforesaid, not regarding, &c. have not as yet paid the amount of the said dividends or any part thereof to him the said *John*, although so to do he the said *William* and *Mary* his wife, so being such administratrix as aforesaid, were requested by him the said *John* afterwards, to wit, on, &c. and often afterwards, to wit, at, &c. but have refused, &c. contrary to the form and effect of the said promise and undertaking of them the said *William* and *Mary* his wife, administratrix as aforesaid, and in breach and violation thereof, to wit, at, &c.”

The 2d count, after stating that there was a certain quantity of *South Sea Stock* to which the plaintiff was entitled, and that he at the request of *Baylis* and his wife had at his own expence procured administration to be granted to the wife of *Baylis* for the purpose of obtaining payment of the dividends by their means, averred, that “in consideration of the premises last aforesaid, and that the said *John* would furnish and supply them with evidence to entitle them to payment of the dividends so due in arrear as last aforesaid for the purpose last aforesaid, they the said *William* and *Mary*, as administratrix, as aforesaid undertook,” &c. as before. The 3d count was on a promise by “the said *William* and *Mary* administratrix as aforesaid,” for money had and received “by the said *Mary* administratrix as aforesaid.” And the 4th was on an account
stated

stated by the husband and wife administratrix, and the promise was alleged to have been made by both.

To the three first counts there was a special demurrer, assigning for causes "that the said *John* hath in and by the said three first counts of the said declaration declared against the said *Mary* as administratrix with the will annexed of all and singular the goods and chattels, rights and credits which were of *Elizabeth Stattard* deceased at the time of her death remaining unpaid and unsettled, for certain supposed causes of action arising after the death of the said *Elizabeth Stattard* and with which the said *Mary* is not chargeable as administratrix as aforesaid; and also for that no sufficient consideration is laid or alleged for the supposed promises and undertakings in the said first and second counts of the said declaration mentioned; and also for that it is not stated or alleged, nor does it appear in or by the said third count of the said declaration that the money therein mentioned to have been had and received by the said *Mary* as administratrix as aforesaid, to and for the use of the said *John*, was had and received by her the said *Mary* on her own account, or as administratrix as aforesaid in right of the said *Elizabeth Stattard*, nor whether the same was had and received by the said *Mary* before or after her intermarriage with the said *William*; and also for that the said three first counts of the said declaration are in other respects uncertain insufficient and informal." On the last count the Defendant tendered issue.

Joinder in demurrer and issue.

Shepherd Serjt. in support of the demurrer. The Plaintiff has charged the husband and wife jointly on a promise made by the wife as administratrix after the death of the intestate. Now in such a case the wife cannot be considered as liable *quæ* administratrix, since a right of action can only arise against her in that capacity from the liability of the deceased, on the nonperformance of his contracts. Thus if *A.* covenant that his executors shall within a certain time after his death pay money, or do some act, and they omit to do so, an action lies against the executor as such, not because they have broken the contract, but because the testator has not secured the performance of his undertaking. Their failure after the testator's death gives the right of action against them in the capacity in which they are placed, but the failure of the testator is the cause of that right of action. This appears from another instance; where *A.* covenants for himself

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and his executors that *B.* shall do an act within six months after *A.*'s death, no action lies against *B.* for not doing the act, but it lies against the executors of *A.* because *B.*'s failure is not the foundation or gist of the action, which arises from the nonperformance of *A.*'s contract. Executors as such are not liable beyond the assets, unless they bind themselves by a personal contract. The ground of such a contract indeed, is their being in the situation of executors: but the judgment against them will be *de bonis propriis*, not *de bonis testatoris*; and in such case *plene administravit* cannot be pleaded. If then the Defendants here cannot plead *plene administravit*, and the judgment against them must be *de bonis propriis*, it is clear that the action is brought on the personal contract of *Mary Baylis*, and not against her *quà* administratrix. All the cases shew that where an action is brought against an executor on promises made by him after the death of the testator, he is charged in his own right. *Trewinian v. Howell*, Cro. Eliz. 91. *Wheeler v. Collier*, Cro. Eliz. 406. *Davis v. Wright*, 1 Vent. 120. *Scott v. Stevens*, 1 Sid. 89. *Atkyns v. Hill*, Cowp. 284. and *Hawkes v. Saunders*, Cowp. 289. But if it appear that the present action is brought on the personal contract of *Mary Baylis*, then it is clear that no action can be maintained against husband and wife, on a promise of the wife after marriage. Indeed the husband is never liable on a contract made by the wife during coverture, but where that contract is considered as having been entered into by her as his agent. And this is the reason of his being charged for necessaries purchased by her. *Manby v. Scott*, 1 Lev. 4. and *Bac. Abr. Baron and Feme*, H. where the opinion of *Hale Ch.* Baron on that case is stated at length. With respect to the third count the plaintiff has declared against *Mary Baylis* in her own right, having merely styled her "administratrix as aforesaid" but not alleged that she was indebted or promised "*as administratrix as aforesaid.*" If therefore the other counts are against her in her capacity of administratrix, this is a misjoinder of action. Indeed money had and received can only be maintained against her in her personal character, *Rose v. Bowler*, 1 H. Bl. 108. If therefore there can be judgment *de bonis testatoris* on the other counts, still on this count the judgment must be *de bonis propriis*.

Vaughan Serjt. contra. It is a rule that the husband must be joined in all cases where the cause of action would survive against the wife. Although the plaintiff might perhaps in this case have declared against the husband as upon a personal contract, yet he

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was at liberty to pursue his remedy against the wife as administratrix, and to make her a co-defendant. The only objection in *Hawkes v. Saunders* was, that the defendant was charged personally, and it seems to have been admitted that if the action had been brought against him in his representative capacity, it might have been maintained. Lord Mansfield there says: "An executor who has received assets is under every kind of obligation to pay a legacy; he receives the money as a trust or deposit to the use of the legatee." So here the wife having in the character of administratrix received a sum of money which belonged to the Plaintiff, she is under every kind of obligation to pay it over. The contract in this case had its inception in the life-time of the intestate, though it was not complete till after her death, and in that respect is not unlike the case of a covenant by the testator and a breach by the executor. The ground of action in *Rann v. Hughes* (a), 7 Bro. Parl. Cas. 550. was a promise by the administratrix to pay the debt of her intestate; and it may be collected from that case that if the judgment had been *de bonis testatoris* it would have been good, but that a judgment *de bonis propriis* was not warranted by such a promise. Admitting the third count to be bad, the Plaintiff is entitled to judgment on the two former counts: and even if it amount to a misjoinder of action, the Court will give the Plaintiff leave to amend by striking out the last count, as in *Jennings v. Newman*, 4 Term Rep. 347; or the same thing may be done by entering a *nolle prosequi*; for it has lately been held that a *nolle prosequi* may be entered after demurrer joined. *Milliken v. Fox* (b).

Lord ELDON, Ch. J. The facts of this case are, that the Plaintiff being entitled to a certain sum of 3 per cent. *South Sea* Annuities standing in the name of *Elizabeth Stattard*, and also to the dividends which had accrued during her life, was desirous of obtaining possession of them through the medium of an administration. The consideration for the promise stated in the declaration is, that the Plaintiff undertook to procure administration to *Mary Baylis* as next of kin, at his own expence, and also to procure evidence by which she should be enabled to receive the dividends. But this affords no consideration for the promise. Though *Mary Baylis* was next of kin it does not appear that she was to derive any peculiar benefit from taking out administration, and if the Plaintiff was desirous of placing some person between himself and

(a) See the case with the opinion of the Judges at length, 7 T. R. 350 n. (a.)

(b) *Ante*, vol. 1. p. 157.

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the *South Sea* Company, it is very obvious that he ought to pay all the expences attending that transaction. Whatever dividends had been received by the intestate in her life-time were part of the general funds; and with respect to them the Plaintiff is entitled to demand payment out of the assets either as a specialty or simple contract creditor, according as he may be possessed of security or not. But the present action seeks a judgment *de bonis intestati*, on the receipt of a sum of money by the Defendants after the death of the intestate. The question is, whether *Mary Baylis*, who appears on this record rather in the character of trustee than in any other character, (for the stock is not assets,) has so much relation to the intestate that her personal act of receiving this money, though as a trustee, shall give a general remedy to the *cestui que trust* against all the assets of the intestate in common with the simple contract and specialty creditors? Not doubting that the Plaintiff has abundance of remedies, I am of opinion that he is not entitled to charge the assets of the intestate with a demand founded on the receipt of that which never was a part of the intestate's estate.

HEATH J. It seems admitted, that judgment must be given *de bonis intestati* in this case in the first instance. But there has been no default on the part of the intestate. The receipt of dividends after the death of the intestate is the cause of action; and the promise of *Mary Baylis* is in consequence of that receipt. This promise will not bind her husband. And as the money never was assets for payment of debts, non-payment in this case cannot bind the estate of the deceased.

ROOKE J. I am of the same opinion.

Judgment for the Defendant.

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BISHOP v. YOUNG.

Debt lies by the payee against the maker of a promissory note expressed to be for value received.

DEBT on a promissory note. The first count of the declaration was; "For that whereas the Defendant on 8th at 8th made his certain note in writing commonly called a promissory note with his own proper hand thereunto subscribed bearing date the same day and year aforesaid, and then and there delivered the said note to the Plaintiff, by which said note the Defendant one month after date promised to pay to the Plaintiff or order 8*l*. value received in goods by him the Defendant, by reason whereof and by force of the statute in that case made and provided the Defendant became liable to pay to the Plaintiff the said sum of money in the said note mentioned

mentioned whereby an action hath accrued," &c. There were other counts in debt for money lent, money had and received, and an account stated, and the common conclusion.

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To the first count there was a special demurrer, but as the cause assigned was afterwards removed by an amendment, the case was now argued as upon a general demurrer.

Marshall Serjt. in support of the demurrer. The question is, whether debt will lie by the payee of a promissory note against the drawer? The Court will not incline to encourage the practice of bringing debt upon simple contract, since that practice subjects the Defendant to serious inconvenience. In case he suffer judgment by default he is liable to execution for whatever sum the Plaintiff may chuse to lay in the declaration; and he has no other mode of preventing that execution than by pleading and going down to trial. The question on this demurrer was expressly decided in *Welch v. Craig*, 8 *Mod.* 373.; 1 *Str.* 680. S. C. where the Court were clearly of opinion that no action of debt would lie on a promissory note.

Bayley, Serjt. *contra*. It is a general principle that where a man enters into a contract on a sufficient consideration for the payment of a sum of money, the party with whom the contract was made may maintain an action of debt thereon. On this principle it is that actions on simple contract or on specialty equally proceed. Lord Chief Baron *Comyns* introduces his title of *Debt on Contract* by saying, "Debt lies upon every express contract to pay a sum certain." *Com. Dig.* tit. *Debt* (A. 8.) And if debt cannot be maintained by the payee of a promissory note against the maker, it certainly is the only case of an express contract where it cannot. To found the action of debt there must indeed be a sufficient consideration. In some cases the consideration must be averred, in others it is implied from the instrument itself. In simple contract, generally speaking, it must be averred, and in that respect there is no distinction between debt and *assumpsit*; whether the averment be necessary or not, depends upon the nature of the contract, not upon the form of action. Where the contract is founded on specialty the consideration is implied; therefore in covenant for payment of a sum certain, or in debt on bond, the consideration need not be averred. There are certain privileges peculiar to a bill of exchange; 1st, although a *chose in action* it may be assigned, and the assignee may maintain an action thereon; 2dly, though a simple contract, the consideration is implied from the nature of the instru-

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ment. Even in *assumpsit* therefore on a bill of exchange the consideration is never stated. It appears from the cases of *Clerke v. Martin*, 2 *Ld. Raym.* 757, and *Potter v. Pearson*, 2 *Ld. Raym.* 759, which were before the statute 3 & 4 *Anne*, c. 9., that the only objection then made to declaring upon a promissory note was, that they did not imply a consideration though bills of exchange did. Then came the statute of *Anne*; the effect of which was to put promissory notes upon the same footing with bills of exchange. The case of *Rumball v. Ball*, 10 *Mod.* 38. came before the Court soon after the passing of that statute. 'That was debt upon a promissory note, no objection was taken to the form of the action, and the Plaintiff was allowed to recover. And in 1 *Mod. Entr.* 312. *pl.* 13. (a) it is said, "In an action of debt on a promissory note, the Defendant demurred to the declaration, and the question was, whether an action of debt would lie? it was said, that it would not lie against the indorser, but that it would lie against the drawer." With respect to the case of *Welch v. Craig*, it is not expressly stated in either of the reports, against which of the parties to the note the action was brought. But it may be observed, that the counsel in support of the demurrer insisted on this distinction, that debt would not lie against the indorser though it would against the drawer; which shews that the action in that case was not brought against the maker, and affords ground to infer the prevailing opinion of the time that if it had been brought against him it might have been supported. The undertaking of the maker differs substantially from that of the indorser; since the former undertakes to pay absolutely, whereas the latter only undertakes to pay upon the default of the maker. Between the payee and the maker, there is a privity of contract: and the ground on which it was held in *Anon. Harl.* 485. that debt would not lie against the acceptor of a bill of exchange, was, that his contract was collateral; admitting that it would lie against the drawer. The case of *Ruddler v. Price*, 1 *H. Bl.* 547. was debt on a promissory note payable by installments, and the declaration was demurred to by Mr. Justice Lawrence, then at the bar, because it appeared that the last installment was not due. But neither at the bar or on the bench was it ob-

(a) In the same page however, *pl.* 14. it is observed, that the words of the statute of 3 *Anne* are, that the party "shall recover damages, &c. which shews that an action of debt will not lie, because damages are never recovered in debt."—and in *pl.* 15. it is

said an action of debt was never known to be brought on a bill of exchange or note," though it is admitted in the same *placitum* that *indebitatus assumpsit* will lie on a note, for in such case the plaintiff may recover in damages.

jected that debt was not the proper form of action, though that objection, had it been thought maintainable, would have afforded an obvious and easy answer to the Plaintiff's demand. A precedent of a declaration in debt against the maker of a promissory note is to be found in *Morgan's Vade Mecum*, 458. The practice of dispensing with a writ of inquiry in actions of *assumpsit*, both on bills and notes, shews that no objection can be raised to this form of action on the ground of the Defendant being deprived of the benefit of a writ of inquiry where judgment has gone by default.

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Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ELDON Ch. J. The question in this case is, Whether an action of debt will lie on such a promissory note as is stated in this declaration, and between such parties as the Plaintiff and Defendant in this suit? The Defendant, by the tenor of that note, one month after date promised to pay to the Plaintiff, or order, 8*l.* value received in goods by him the Defendant; and it is averred that the note so made was delivered to the Plaintiff, being first signed by the Defendant. This is a note, therefore, with a consideration apparent upon the face of it, and the action of debt is brought by the payee of that note against the person who made and signed it; not by the indorsee against the maker or the indorser. It was insisted for the Defendant, that under these circumstances the action of debt would not lie, and several cases were cited in support of that proposition. The case particularly relied upon was *Welch v. Craig* reported in 1 *Str.* 680. and in 8 *Mod.* 373. In the former report it is laid down generally, that before the statute no action lay upon the note as a note, nor did an action of *indebitatus assumpsit* lie upon a bill of exchange. I say, that it is there laid down generally; for it is not stated between what parties to the bill the action is supposed to arise. The report then proceeds, "the only remedy given upon the note by the statute is the same that was before on an inland bill of exchange." The inference therefore is, that debt would not lie on an inland bill of exchange. From this case, as reported, we are not able to collect who the person was that brought the action, whether the payee or the indorsee, nor against whom the action was brought, whether the maker or the indorser. The doctrine is laid down without any circumstances enabling us to make a proper application of the case, and the conclusion which results from the reasoning

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there used is, that an action of debt will not lie on a promissory note between any parties, whether there be an apparent consideration or not. But it is impossible to read the report of the same case in 8 *Mod.* without perceiving that we should be in great danger of applying the case too generally if we were to hold it as clear law, that without any exception an *indebitatus assumpsit* will not lie on a foreign bill, an inland bill, or a promissory note. In 8 *Mod.* it was argued by the counsel, that debt would not lie against the indorser, but that it would lie against the drawer. We shall see presently whether there is any ground in the principles of the action of debt for that distinction. In that very argument the reason given why a general *indebitatus assumpsit* will not lie on a promissory note, is, *for want of a consideration*. The Court are said to have been "clearly of opinion that no action of debt would lie on a promissory note declaring thereon," and they use these expressions, "By the custom of merchants no remedy was given on foreign bills of exchange, but by action on the case; the statute 9 & 10 *W. 3. c. 17.* has given the same remedy to inland bills, and the 3 & 4 of *Anne* to promissory notes; an *indebitatus assumpsit* will not lie on a bill of exchange." According to this report the Plaintiff had leave to discontinue: it is therefore impossible for us to obtain a sight of the record and satisfy ourselves, whether the action was brought by the payee against the maker, or by any other person standing in any other relation, or whether there was any apparent consideration on the face of the note. But it is observable, on the two reports taken together, that the reason for holding that debt would not lie, was founded on the analogy of promissory notes to inland and foreign bills of exchange. If, therefore, it be true that an action of debt brought by the payee of an inland or foreign bill of exchange against the drawer of such bill, will lie, it will remain to be considered whether the analogy will not require us to hold in the case of a promissory note having an apparent consideration, that an action of debt will lie if brought by the payee of such note against the maker. The case in *Hardres* seems to open the principles on which this case must be decided. The effect of that case, and of *Pearson v. Garret*, *Skin.* 398. are very accurately expressed in *Com. Dig. tit. Debt.* (B). Lord Chief Baron *Comyns* after having said that debt lies upon every express contract to pay a sum certain (a), and also, that it lies, though there be only an implied contract (b),

(a) *Tit. Debt* (A. 8.)(b) *Tit. Debt* (A. 9.)

thus states the principles of these cases: "So debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty, *R. Hard.* 485. So it does not lie upon a note to pay, without consideration; though alleged that it binds by custom, *R. Skinn.* 398." The case in *Hardres* was debt against the acceptor of a bill; and the Court in declaring their opinion, that the action will not lie, say, "The acceptance does not create a duty, no more than a promise made by a stranger to pay, &c. if the creditor will forbear his debt. And he that drew the bill continues debtor notwithstanding the acceptance, which makes the acceptor liable to pay it." As the reasoning, therefore, stated in this case against the liability of the acceptor in an action of debt, is this, namely, that his situation is analogous to that of a person who takes upon himself an obligation to pay that which is not his debt, but the debt of another, it is clear, that the Court considered the drawer himself as owing the debt or duty, though no debt or duty were raised against the acceptor. Looking at the effect of a bill of exchange, it seems very reasonable to hold, that although the acceptor be primarily liable, yet that he is not liable for his own debt, but for that of another. The drawer owes the debt; and if the drawee refuse to accept, an action may be immediately brought against the drawer (a). If the drawer does accept, the transaction amounts to no more than an undertaking on his part to pay the debt of the drawer, and on the part of the holder to resort to the acceptor, to be paid out of the effects of the drawer in his hands, before he resorts to the drawer himself. With respect to promissory notes the books say, that when they are indorsed by the payee, they resemble bills of exchange. But this is rather inaccurate with reference to the case before us. For though the payee, by making himself an indorser, assumes the character of drawer, and the maker assumes that of an acceptor to certain purposes, yet with respect to the question, Who owes the debt? where there is an apparent consideration, the person who owes the debt is still the maker of the note, as well as the drawer of the bill of exchange. Here, therefore, Lord Coke's maxim may very properly be applied *nullum simile est idem*. Agreeable to this is *Hard's* case, *Salk.* 23. where it is said that *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange, for his acceptance is but a collateral engagement, but that it will lie against the drawer, for he is really a debtor by the

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(a) *Macarty v. Brown*, 2 Str. 949. 3 Wils. 117. S. C. *Bright v. Purrier*, Bull. N. P. 269. *Milford v. Mayor*, Doug. 54. *Stedman v. Goech*, Esp. N. P. Cas. 5.

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receipt of the money. So also in *Hodges v. Steward, Skinn.* 346. it is allowed by the Court that debt will lie against the drawer of a bill of exchange for value received; and the reason given is, "but this is for the apparent consideration." Now, in point of fact, has not this principle been applied to promissory notes where there has been an apparent consideration? In *Rumball v. Ball* the Plaintiff was allowed to recover in debt on a note which from its tenor was clearly a promissory note within the statute. Indeed, if it be true that an action of debt will lie against the drawer of a bill of exchange in favour of the payee, it seems to me to be the necessary effect of the statute of *Anne*, which puts notes on the same footing with bills of exchange, that debt may be maintained by the payee of a promissory note against the maker. That statute makes a distinction between the remedies which it gives to the payees and the indorsees: it enacts, that the payee may maintain an action upon the note in the same manner as he might do upon any inland bill of exchange against the person who signed the same, and that the indorsee may maintain his action either against the person who signs such note or against any of the persons who indorse the same, in like manner as in cases of inland bills of exchange. If, therefore, he to whom a bill of exchange for value expressed is made payable, may bring an action of debt against the person who signed it, it follows from the very words of the statute, that he to whom a promissory note, having an apparent consideration, is made payable, may have the same remedy of debt against the person who signed such note. I take no further notice of the case of *Rudder v. Price* than to observe, that though it was argued for the Defendant by a person of great abilities, it did not occur either to him or to the Court, to observe that, whether the installments on the note were due or not, still the form of the action was misconceived.

Under these circumstances, the Court is of opinion, that in this particular case the action of debt may be maintained. We do not say how the case would stand if the action were brought by any other person than he to whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration upon the face of it.

Per Curiam,

Judgment for the Plaintiff.

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LAING v. RAINE, One, &c.

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A RULE *nisi* having been obtained for setting aside a judgment entered upon a warrant of attorney under a judge's order, upon the ground of the order having been obtained without any affidavit of the subscribing witness to the warrant of attorney; *Shepherd* Serjt. now shewed cause and relied on an affidavit by the Plaintiff's attorney, which stated that the warrant of attorney was given to secure a sum of money payable by installments; that the deponent being under a difficulty to procure the subscribing witness at the time when one of the installments became due, applied to the Defendant himself, and after stating his difficulty, proposed that the Defendant should acknowledge the warrant of attorney "so as to enable the deponent, if it should become necessary, to enter up judgment thereon," he giving the Defendant time to pay the installments then due; that the Defendant agreed to this proposal, and that the installment not being paid within the time, judgment was entered up.

Williams Serjt. in support of the Rule cited *Abbot and Another v. Plumbe*, *Doug.* 216. and insisted that the Defendant's acknowledgment would not avail (a), though he allowed, that where a Defendant agrees to admit an instrument, the evidence of the subscribing witness may be dispensed with.

LORD ELDON Ch. J. and HEATH J. were of opinion, that upon a fair construction of the affidavit it appeared that the Defendant did not simply acknowledge the instrument, but agreed that the Plaintiff should act upon it as if the witness himself had been produced.

ROOKE J. seemed to entertain some doubts upon the subject.

Rule discharged.

(a) Recognized *per Lawrence J. Barnes v. Trompowsky*, 7 T. R. 267.

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Feb. 5th.

The KEEPER'S and GOVERNORS of the Possessions, &c.
of HARROW SCHOOL v. ALDERTON.

In an action of waste on the statute of Gloucester against tenant for years, for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the Court will give the Defendant leave to enter up judgment for himself.

THIS was an action of waste on the statute of Gloucester, for ploughing up three closes of meadow land, and converting the same into garden ground, and building thereupon, to the damage of the Plaintiffs of 500 *l.* Plea, Not guilty (*a*).

The cause was tried before Heath J. at the Westminster sittings after last Trinity Term, when the jury found a verdict for the Plaintiff with three farthings damages, being one farthing for each close.

In the Michaelmas Term following, Cockell Serjt. obtained a Rule, calling on the Plaintiff to shew cause why the judgment should not be entered up for the Defendant, on account of the smallness of the damages recovered, on the principle that *de minimis non curat lex*; and cited in support of the application *Bro. Abr. tit. Waste*, pl. 123. *Co. Lit.* 54. *a.* 2 *Inst.* 306. *Cro. Car.* 414. 452. *Finch's Law*, lib. 1. cap. 3. *f.* 34. adopted 3 *Black. Com.* 228. *Vin. Abr. tit. Waste N. and Buller's N. P.* 120.

Shepherd Serjt. now shewed cause. There are two species of waste, that which consists in the abuse of the thing in which the waste is committed, and the consequent deterioration of its value; and that which changes the nature of the thing itself. In waste of the first kind, if the damage be very small, it may be right that no action should lie, because the deterioration is the essence of the waste. But where the waste consists in the alteration of the property, that alteration is the essence of the waste. If then the amount of pecuniary damage be the criterion of this kind of waste also, the distinction will no longer exist; for it will then be the deterioration of value, and not the alteration of the property which will constitute the waste. It is clear that "if the tenant convert arable land into wood, or *è converso*, or meadow into arable, it is; for it changeth not only the course of his husbandry, but the evidence of his property." *Co. Lit.* 53. *b.* though it be for the advantage of the lessor, *Dyer*, 35. *b.* *Hob.* 234. 2 *Leon.* 174. *per Periam J.* and *Owen*, 67. All the cases in which the Rule contended for has prevailed, have been cases of deterioration of property; and though the Court will not allow the judgment to be entered for

(*a*) For precedents of pleadings in this action, see *Co. Ent. tit. Waste & Rest Ent.* same title.

the Plaintiff where the damages in such a case are small, yet though the damages be small in this case, where the nature of the property itself has been changed, they will not deprive the Plaintiffs of a judgment by which they are entitled to recover the land (a). The observation of *Bracton*, lib. 4. c. 18. f. 12. fol. 316. b. that *vastum erit injuriosum nisi vastum ita modicum fuerit, propter quod non fit inquisitio facienda* seems to be confined to cases of deterioration; for he is there only speaking of the tenant, who in taking *eslovers si mensuram excedat utendo et capiendo ultra rationabile esloverium suum, utitur quasi in alieno*. It is also to be observed, that where waste is found to have been committed in several places, the Plaintiff is entitled to recover the thing wasted, notwithstanding the smallness of the damages, 14 H. 4. 11. b. *Bro. Abr.* tit. *Waste*, pl. 70.

Lord ELDON Ch. J. I confess, that when this application was first made, I was not aware, that under the circumstances of the case the Defendant was entitled to demand judgment: but my Brother *Heath* has satisfied me that the application is supported by the current of authorities. I do not indeed see precisely on what ground those decisions have proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a Plaintiff to take advantage of his judgment, where such small damages have been recovered as in this case. As, if the owner of land suffer his tenant to lay out money upon the premises, and then bring an action of waste to recover possession when the land may have been improved to ten times the original value. The cases do not appear to authorize the distinction contended for by my Brother *Shepherd*. Whether the waste committed be by alteration of the property, or by deterioration, still the jury, in estimating the damages, take into consideration the injury which the Plaintiff has sustained; and in this case the jury have estimated the damage which these Plaintiffs have sustained, by the alteration of their

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(a) By the statute of *Gloucester*, 6 Ed. 1. c. 5. if tenant for life or years do waste, he shall forfeit the place wasted, and treble damages; if a guardian, he shall forfeit his wardship, and shall render damages to the heir if the wardship forfeited be not sufficient to satisfy the damages. In *Hil.* 34 Ed. 3. an infant having brought waste against his guardian, damages were found to the value of twenty-one pence; and it was contended, that for the smallness of the value it should not be adjudged waste. The Court upon great consideration awarded

“ that the Plaintiff should recover the wardship, &c. without damages, because the wardship was worth more than the damages of the place wasted,” *Fitz. Abr. Waste*, pl. 116. It does not, however, necessarily follow from this case, that where small damages are found against tenant for life or years, the Plaintiff shall recover the place wasted, without damages; and indeed it was laid down so early as *Pasch.* 8 Ed. 2. that in such case the Court can never award one without the other, *Fitz. Abr. Waste*, pl. 111.

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property, at three farthings only. The Courts of Common Law seem to have entertained a sort of equitable jurisdiction in cases of this kind.

HEATH J. This doctrine prevailed as early as the time of *Brañton*, who wrote before the statute of *Gloucester*. With respect to the distinction taken, there is no reason why pecuniary damages should not be assessed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furze-brake in which game have bred into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.

ROOKE J. I am of the same opinion.

Rule absolute.

Feb. 5th.

Ex parte EVAN EVANS.

If by abuse of the process of one of the Courts at Westminster a sheriff's officer extort a promissory note from a suitor, and then declare upon that note in another of the Courts at Westminster, the latter Court cannot interfere summarily to punish the officer under 32 Geo. 2. c. 28. s. 11.

THIS was an application under the Lord's act 32 Geo. 2. c. 28. s. 11. (a) for an order to punish two sheriff's officers for extortion, and to stay their proceedings in an action against the petitioner, with costs. By the affidavit on which the application was founded, it appeared that the petitioner having sued process of *quo minus* out of the Court of *Exchequer*, applied to one of these officers to arrest a person in *Oxfordshire*, and proposed to give him ten guineas if he should succeed in making the arrest, but nothing in case he should fail; that the other officer, who was the principal, refused this proposal, but insisted on, and had his regular fee of one guinea; that the two officers then effected the arrest, and having so done, demanded the ten guineas which had been offered in the manner above-mentioned, and obliged the petitioner to give them his note for that sum; that on this note the petitioner was sued in the Mayor's Court at *Oxford*, but the proceedings there were afterwards stayed, on the petitioner giving the officers a new note for the

(a) By that section, "for the more speedy punishing gaolers, bailiffs and others, employed in the execution of process for extortion and other abuses in their respective offices and places," upon the petition of any person arrested by any process, complaining of exaction or extortion by any gaoler, &c. "unto any of his Majesty's Courts of Record at Westminster from whence the process issued by which any person who shall so petition was arrested, or under whose power or jurisdic-

"diction any such gaol, prison, or place is," such Court is authorized "to hear and determine the same in a summary way, and to make such order thereupon for redressing the abuses, which shall by any such petition be complained of, and for punishing such officer or person complained against, and for making reparation to the party or parties injured, as they shall think just, together with the full costs of every such complaint."

above sum, and that on this last note an action was commenced in this Court.

Williams Serjt. moved this on the ground of its being an abuse of the process of this Court, and within the provisions of 32 *Geo. 2. c. 28. s. 11.*

Sellon Serjt. shewed cause against the Rule *Nisi*, and insisted that the Court had no authority to interfere in the way desired, inasmuch as, if an abuse of any process had taken place, it was an abuse of the process of the Court of *Exchequer*.

Lord *ELDON* Ch. J. on this day said, We have looked into the act of parliament, and are satisfied that we have no jurisdiction in this case. The summary power of interference is given to the Court from whence the process issues; we therefore can take no notice of this application.

Per Curiam,

Rule discharged.

ILES and Others v. BOXALL.

Feb. 5th.

DEBT on bond.

On *oyer* craved by the defendant it appeared from the recital of the condition that by an act of parliament of the 37 of *Geo. 3.* for dividing, allotting and enclosing the open and common fields, &c. in the parish of *Croydon* in *Surry*, the Plaintiffs who were appointed commissioners, were directed, "to make an allotment of land to the person or persons entitled to the rectorial tithes of commons and wastes within the said parish in lieu of such tithes;" that it was also provided by the said act that those whose claims should not be allowed by the commissioners, and any three or more whose claims should be allowed by the commissioners but who should object to the allowance of the claims of other persons, might proceed to trial of his or their claims at the assizes for the county in a feigned cause to be carried on between the persons claiming and any one of the commissioners disallowing their claims, or the persons objecting to the allowance of such claims; that the Defendant claimed to be entitled to the rectorial tithes of the said commons and wastes, and his claim was allowed; that other persons having also claimed to be entitled to certain proportions of the same tithes, and having objected to the determination of the commissioners respecting the Defendant's claim, resolved to proceed to trial, and delivered issues accordingly, that "although the said Plaintiffs were

A bond taken by the commissioners, appointed under an inclosure act, to indemnify themselves against the expences of a suit brought to try the right to an allotment made by them, and in which they are, according to the directions of the act, made Defendants, is not void; though there be a fund provided out of which such expences may in some cases be satisfied; at least if the commissioners doubt whether the case in question be one of those cases.

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enabled by the said act to reimburse themselves the costs of actions brought against them as therein is expressed, yet as they considered the question respecting the said tithes not to be of that public nature which would authorize them to defend the actions concerning the same at the public charge," they required the defendant to indemnify them from all expences attending the same, and which he agreed to do, and for that purpose entered into the bond; the condition of which was to indemnify the Plaintiffs from those expences.

The Defendant pleaded; 1st, *non est factum*; 2dly, the act of parliament authorizing the commissioners to set out an allotment by way of compensation to the owners of rectorial tithes in the first place, and then to divide the rest of the lands among the persons entitled thereto, the material clause of which, after directing that the claims of the different persons concerned in the division and allotment, in case of the determination of the commissioners being disputed, should be settled in manner before stated in the recital of the condition, provided, that in order to raise a sufficient sum of money to defray the charges and expences of obtaining and passing the act, and of carrying it into execution "and of defending any action or actions which might be brought against the said commissioners or any of them, and all other the charges and expences arising and accruing in the carrying the said act into execution," it should be lawful for the commissioners "to make sale by auction of such part or parts of the said commons, marshes, heaths, wastes, and commonable woods, lands and grounds, as they should deem sufficient for the purposes aforesaid." The plea then went on to state that the Defendant, in pursuance of the said act, did deliver to the commissioners a claim in writing to the rectorial tithes of all the commons, &c. within the said parish of *Croydon*, which was allowed by them; that certain other persons afterwards claimed to be entitled to certain proportions of the same tithes, which claims were disallowed by the commissioners; that thereupon afterwards and before the making of the said writing obligatory three several feigned actions were brought against one of the commissioners, and which said actions at the time of making the said writing obligatory were respectively depending in the Court of *King's Bench*, and the several plaintiffs respectively intended to proceed to the trial of their respective claims at the next assizes for the county of *Surry*, of all which said several premises the Plaintiffs, so being such commissioners as aforesaid, had notice. "And thereupon

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capacity. *Empfen v. Bathurst, Hut. 52. (a)*. That case does not proceed on the principle of duress, but that the bond taken by the sheriff being extorsive was void at common law. Now a person acting under a judicial authority, delegated to him by act of parliament, is under as great an obligation to do his duty as an officer who derives his authority from the common law. The commissioners have no option, but must join the issue when tendered to them, and defend it when joined. If it were not so, many of the claimants who are poor, and whose rights are small, might be deprived of them altogether in consequence of the expence attending the litigation. The commissioners have no more right to demand a bond before they join issue than an under-sheriff has to demand his fees before he executes process; which he cannot do. *Hecott's case, 1 Salk. 330.*

LORD ELDON Ch. J. The commissioners have a right to say, "we are doubtful whether under the provisions of this act we can in this particular case be re-imburled the expences of the suit out of the fund provided by the act: either compel us to defend the issue by obtaining a *mandamus* from the Court of *King's Bench*, or give a bond to indemnify us against the expences which we may incur." If the Defendant pays the expences of the suit according to the condition of his bond, he will then be entitled to stand in the place of the commissioners, and may compel them to re-imburse him by a sale of land, if they would have been warranted in so re-imburfing themselves. If they would not have been warranted in so re-imburfing themselves, the Defendant is the proper person to pay the expences of the suit. I cannot but entertain a doubt upon this act. The property which was the subject of the act consisted of lands and tithes. The commissioners are directed to set out certain allotments in lieu of tithes, and then to divide the rest among the land-owners. When they have satisfied all the demands of the tithe-owners, by setting out for them their due proportion of land, it appears to me that any question arising among the tithe-owners, as to their respective rights to the land given in lieu of tithes, must be litigated at their own expence. The act seems to sever the consideration of the tithes and of the land. Can it be contended, that if several claim to be entitled to the tithes, and the land owners admit the lands to be subject to tithes, that the latter are to pay the expences of a

(*) *Winch. Rep.* 20. 50. *Winch. Entr.* 334. S. C. also cited *Poph.* 176.

litigation among the former, in which they have no interest? It may as well be said that if a dispute should arise among the land-owners they would be entitled to have the expences of such dispute defrayed out of the allotments in lieu of tithes.

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Per Curiam,

Judgment for the Plaintiffs.

(In the EXCHEQUER CHAMBER).

II. BEARD and ARABELLA his Wife v. WEBB and Another; in Error.

Feb 5th.

THE record in this case, after stating in the usual form the appointment of attornies by the Plaintiffs below, (the Defendants in error,) and also by *Arabella Beard* the sole Defendant below, (and one of the Plaintiffs in error,) proceeded to set out a declaration by bill in the *King's Bench* against the latter for goods sold and delivered, money paid, lent, had and received, and on an account stated. To this the pleas were; 1st, *Non assumpsit*; 2dly, that the Defendant was *covert* of one *H. Beard*; 3dly, a set-off. The replication took issue on the first plea, and answered to the second, "that although true it is that she the said *Arabella* before and at the time of the making of the said several promises and undertakings in the said declaration mentioned, and each of them, was, and yet is the wife of, and married to the said *H. Beard*, as the said *Arabella* hath in her said plea, secondly, above pleaded in bar, alleged; yet for replication in this behalf, the Plaintiffs say that the city of *London* is an ancient city, within which said city there is and from time whereof, &c. there hath been a custom used and approved of; that is to say, that where a *feme-covert* of a husband useth any craft in the said city on her sole account whereof her husband meddeth nothing, such a woman shall be charged as *feme-sole*, concerning every thing that toucheth her craft; and that the said *Arabella* before, and at the time of the making of the said several promises and undertakings of the said *Arabella* in the said declaration mentioned, used the craft of an upholsterer in the said city, on her sole account, whereof the said *H. Beard* during all the time aforesaid meddled nothing within the said city of *London*, to wit, at, &c. and that the said goods, &c. were sold and delivered by the said Plaintiffs to her the said *Arabella*, the wife of the said *H. Beard*, as using the craft aforesaid, within the said city, on her sole account as aforesaid." There were similar averments respecting the money paid, lent, had

A feme covert sole trader in the city of London, is not liable to be sued as such in the courts at Westminster: And even in the city courts the husband should be joined for conformity.

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and received, and account stated. On the plea of set-off issue was tendered. The rejoinder, after protesting that there was no such custom as that mentioned in the replication, tendered issue on the Plaintiffs' averment that she carried on the trade of an upholsterer on her sole account, and joined issue on the set-off. The rebutter was a joinder in the issue tendered by the rejoinder. Upon the trial of these issues the jury found, as to the first, that the said *Arabella* did undertake, &c. As to the second, that she did "use the craft of an upholsterer in the city of *London* within mentioned, according to the custom of the said city, on her sole account, whereof her husband the within-named *H. Beard* meddled nothing;" and as to the third, that the Defendant had no set-off. On this finding judgment was entered up for the Plaintiffs in the *King's Bench*.

Arabella Beard, (the Defendant below,) together with her husband *H. Beard*, having brought a writ of error in this court assigned for errors, that the Plaintiffs below "declared against her the said *Arabella* as a *feme-sole* in the court of our said Lord the King before the King himself, whereas by the law of the land no such action could or can be supported against the said *Arabella* in the said court; and also that the said *Arabella* appeared in the said suit and pleaded by *T. W.* her attorney, whereas by the law of the land the said *Arabella* could not during her coverture make an attorney in the said court without the said *H. Beard* her said husband; and also, that the said *H. Beard* should have been joined in, and made a party to, the said suit." Joinder in error. *

Wigley for the Plaintiffs in error. It is a settled principle that a *feme-covert* sole trader cannot be sued upon the custom of the city of *London* anywhere but in the city courts, because that is a custom regulating the proceedings of those courts. Upon this *Stanton's case*, *Moor*, 135. and *Bobun, Privil. Lond.* p. 83. are express; and in the first of these books *Fenner* cited 1 *Ed.* 4. in support of this doctrine. At the end of the report in *Moor* there is another case respecting a custom of the city of *London*, where *Fleetwood* Serjt. and Recorder of *London*, on moving for a *procedendo*, said, that the "*Common Pleas* could not do right upon the said custom," and therefore it was granted him. So in *Langham v. la Femme de John Bewett*, *Cro. Car.* 68. a return to a *habeas corpus cum causâ* to remove a cause from the city court being that the wife was sued as a *feme-sole* merchant, *Hutton*, *Harvey*, and *Croke*, Js. were of opinion "that it was such an action and cause where-

"with this Court (C. B.) ought not to meddle nor take conuzance,

"nor

“nor can give the party relief although he hath good cause of
 “suit; for in *London* they are judges of their own customs, and
 “by intendment will proceed in their courts there according to
 “their customs and not otherwise, and therefore we ought not to
 “take away their privileges, nor remove the action out of that
 “court, where we cannot give remedy in this.” The same law
 is laid down by Lord *Mansfield* and *Yates J.* in *Lavie v. Philips*,
 3 *Bar.* 1776. 1 *Bl.* 570. S. C. and agrees with *Offley v. Johnson*,
 2 *Leon.* 166. This was again acted upon in *Pope v. Vaux and*
Wife, 2 *Bl.* 1060. The most modern recognition of this law is to
 be found in *Carwells v. Shaw*, 4 *Term Rep.* 361. and in the case
 of *Reade v. Frances Jewson*, there cited by *Buller J.* The case of
Moriton v. Packman et Uxor, 2 *Keb.* 583. 1 *Mod.* 26. S. C. shews,
 that though the custom be admitted upon the record, yet the courts
 at *Westminster* cannot try whether the trade be within the custom or
 not. In the present case therefore the jury have found that which
 is not a subject of inquiry in the court in which they found it.
 It is also observable, that in all the cases cited it is said that the
 husband ought to be joined for conformity; and *Dyer*, 271. *b.*
 is mentioned by *Aston J.* 4 *Term Rep.* 364. as a singular instance of
 the wife being suffered to appear alone to prevent her being
 waved, the husband being banished (*a*). This being a case where
 the wife is liable to execution, and where the husband may
 therefore be deprived of her fellowship, the latter has acted right
 in joining in this writ of error. *Hayward v. Williams*, *Sty.* 254.
 280. *Earl of Bedford's case*, 7 *Co.* 8. and *Hob.* 225. (*b*)

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Wood for the Defendants in error. This case differs from those
 cited, inasmuch as the custom being here stated on the record and
 admitted, the Court is not called upon to take judicial notice of it.
 Indeed, the only case in which the custom appeared upon the
 record is *Stanton's case*; and there it was held that the action might
 be maintained in the courts above. It is true, that if a party would

(*a*) There are two cases on this subject
 in *Dyer*, 271. *b.* one in the text and one in
 the margin, neither of which, however,
 exactly corresponds with the description
 supposed to be given by *Aston J.* in 4 *Term*
Rep. 364. The former was debt on bond
 against husband and wife; in which process
 was continued until the husband was out-
 lawed and the wife waved; the wife being
 then brought in by process, shewed the
Queen's pardon, and the Court held that
 she should be discharged from the imprison-
 ment, but that the pardon could not be al-

lowed, since the wife alone could not sue a
scire facias to compel the Plaintiff to de-
 clare; and the pardon had a condition, *ita*
quod ipsa faceret restia in curia, which she
 could not do without her husband. In the
 latter case process in debt against husband
 and wife having been continued to the
 exigent, the husband appeared, but would
 not suffer his wife to appear, and it was
 ruled that the wife might make an attorney
 to prevent her being waved.

(*b*) *Vide etiam* 18 *Ed.* 4. 4. and *Edwards*
v. Simpson, 1 *Roll. Abr.* 748. pl. 18.

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proceed by foreign attachment, he can only avail himself of that remedy in the city courts (a). But the custom stated in this case is very strong in its nature, and is, as was said of the custom of apprenticeship in *Stanton's* case, pleadable everywhere. The words of the custom are, that she shall be "charged as a *feme sole* in every thing touching her craft;" the meaning of which is, that she shall be charged, not in the city of *London* only, but all the kingdom over. Great mischief might ensue if this were otherwise: for a *feme-covert* sole trader, after having incurred a debt in *London*, might quit that city and so defraud her creditors: In 1 *Ed.* 4. 6. *Billing* having asserted that by the custom a *feme* might be sued in the superior courts without joining her baron, *Littleton* cited a case to the contrary; but it is added, that in the case cited the custom of *London* was not alleged; *et ideo, quære*. [*Chambre Barou*; In 1 *Ed.* 4. 6. *Danby* J. observes, that when an action is brought on a custom, which custom lies in the conuizance and allowance of a particular jurisdiction, the action on the custom is not maintainable in the superior court.] Most of the cases cited for the Plaintiff in error, were on motion for *procedendo*; in which cases the custom could not have appeared upon the record: for in declarations in the city court the custom is never averred; but the judges there take notice of the custom judicially, as the judges of the courts at *Westminster* do of the common law. In *Royston v. Ivory*, 3 *Keb.* 302. (b) a *procedendo* was awarded on the suit of a *feme-covert* sole merchant; and the Court of *King's Bench* there said they must be ascertained of their jurisdiction, but if the custom be alleged in the declaration it is sufficient. The meaning of this seems to be, that if the custom appear to the Court above, that Court will entertain the cause, and that if the custom had been alleged in in that case a *procedendo* would not have been granted. Neither in *Caudell v. Shaw* or in *Read v. Jewson* was any custom alleged. With respect to the second objection, that the husband ought to have been joined, it may be asked, how the action can be brought against the husband and wife, if the latter only is to be liable? If

(a) To this effect see *Turbill's* case, 1 *Saund.* 67. *Gilb. Hist. C. B.* p. 209. *ed.* 2. And this doctrine has lately been recognized in *Ridge v. Hardcastle*, 8 *Term Rep.* 417. though some authorities, *Dyer*, 287. a. and *Lodge's* case, 2 *Leon.* 156. were there alluded to as being the other way.

(b) In *Bobun Privil.* *Lond.* p. 188. and in *Caudell v. Shaw*, 4 *Term Rep.* 362. *arguendo* the custom is said to have been alleged in

the declaration. The report in *Keeble* is very confused, but the result of it seems to be, that the custom was alleged in the declaration below, but was not returned upon the writ by which the action was removed; that the Court doubted whether they could award a *procedendo* without such return, since it did not appear whether the Court below had jurisdiction; but that finding the custom alleged in the declaration they did award it.

the judgment were against both, the execution might go against both.

Cur. adv. vult.

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LORD ELDON Ch. J. (after stating the record) now delivered the judgment of the Court.—Supposing the jury were competent in this case to enter into the question of the custom at all, still they have not carried that custom farther in point of precision as to how, and where, and in what manner the *feme-sole* trader is to be charged, than it was alleged in the replication. It stands therefore before us upon the original allegation as made by the Plaintiffs below. On this record the Court of *King's Bench* gave judgment in favour of the Plaintiffs below; and in deference to the opinion of that Court, (entertaining a contrary opinion myself,) I could have wished to have known the grounds upon which it proceeded before we ordered a reversal. The writ of error assigns for causes; 1st, That *Arabella Beard* has been sued in the court above as a *feme-sole*; 2dly, That she had no power to make an attorney in the court where she was sued without her husband; and 3dly, That her husband ought to have been joined in the action for conformity. After considering the authorities upon this subject, it is the opinion of this Court that the judgment of the Court of *King's Bench* cannot be supported. We are of opinion that this action on the custom will not lie against a *feme-covert* in the courts of *Westminster-hall*, though the custom may in some instances be pleaded in bar there. And we think that it would be giving a greater degree of effect to the custom than belongs to it, to hold that a *feme-covert* may make an attorney in *Westminster-hall*; and we also think that she cannot be sued as a *feme-covert* sole trader without joining her husband at least for conformity. Many cases were cited in argument; but on giving my best attention to the distinctions made in favour of the Plaintiffs below, I was not able to perceive that any other propositions were attempted to be supported for them than that as the custom appears upon this record, therefore this action may be maintained against the wife in the superior court, and that there is no occasion to make the husband a party to the suit, as no judgment can be obtained against him. Now, in the first place, it makes no difference whether the custom appear upon the record or not; and, 2dly, I do not admit that it does appear; for if the place where the wife is to be charged be part of the custom, that circumstance not being stated upon the record the custom does not appear; and there-

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fore, supposing the other objections to be of no avail, it appears to me that the Plaintiffs for that reason could not have any judgment. It is clear, I think, that if the custom had appeared on the record such as it really is, it would have put an end to the action altogether. The customs in the city of *London* are of different kinds; some are available everywhere, and others, of which this is one, are spoken of in the books in terms which are not very intelligible, unless explained by the cases on the subject. These latter customs are called executory customs, the exposition of which expression is, customs united to the courts of the city of *London*. They are pleadable in *London* and not elsewhere, except so far as they may be made use of in the superior courts by way of bar. The following are customs of this species: an infant shall not wage his law on a covenant for tabling; no person shall wage his law where an alderman has signed the contract as a witness; pledges may be sued without deed; and debt will lie against executors in simple contract. In addition to these is the custom in question, *viz.* that a *feme-covert* sole merchant may sue and be sued with reference to her transactions in *London*. But I do not admit that she can be sued there without joining her husband to a certain extent in the proceedings. The case of an infant binding himself apprentice by covenant under the custom of the city of *London*, is allowed to be pleadable everywhere and to stand upon the same footing as the customs of *Gavelkind* and *Borough-English*. If, then, it can be made out that the custom in question is united to the courts of the city of *London*, it follows of course that this action cannot be supported upon it in the superior courts. That it is united to the city courts, and that no action can be maintained upon it here, is clear from authorities. Even if an action could be maintained here, it could only be maintained in the same manner as in the city courts; and the authorities prove that no action could be maintained in the city courts unless the husband be made a party to the suit for conformity: nor can the wife make an attorney to conduct her defence either in the city courts or in *Westminster-hall*. The first authority to be cited respecting customs united to the city courts is *Offley and Johnson's case*, 2 *Leon.* 166. There one of two sureties having been sued to execution in the city court brought an action against his co surety in the same court for contribution according to the custom; the cause was removed into the *King's Bench*, and afterwards a *procedendo* was prayed; "and because upon this matter no action lieth by the
" course

“ course of the common law but only by custom in such cities
 “ the cause was remanded; for otherwise the Plaintiff should be
 “ without remedy.” From these words it is clear that the Court
 did not proceed upon the ground of the custom not appearing
 upon the record. It is manifest also from subsequent authorities
 that the proposition which the Court meant to lay down was, that
 whether the custom be stated on the declaration or not, an action
 will not lie upon the custom in *Westminster-hall*. In *Chamberlain and*
Thorpe's case, 1 *Leon.* 130. (a), which was debt in the *King's Bench*
 on a recognizance acknowledged before the Mayor of *London*, ac-
 cording to custom, at the conclusion, *Ray* says, “ A more strange cus-
 “ tom than this hath been allowed of here before, *scil.* that a *feme-*
 “ *covert* shall sue an action alone without her husband, for she is
 “ a sole merchant;” but this proposition seems to be overstated;
 for *Gawdy*, whose opinion, from what we know of him, is entitled
 to great respect, says, “ A *feme-covert* may have an action within
 “ the city, but not here.” I think it will be difficult to contend
 that the right to sue and the liability to be sued do not stand
 upon the same footing. Next comes *Stanton's case*, **Moor**, 135.
 That was covenant on an indenture of apprenticeship: the
 Defendant pleaded infancy, and the Plaintiff replied the custom
 of *London* which enables an infant to bind himself “ apprentice by
 indenture with covenants, and that he shall be bound by the cove-
 nants as if he were of full age at the time of the indenture;” *Fen-*
ner for the Defendant demurred, and one cause of demurrer was,
 “ that such custom is solely in *London* and not at the common
 law, and therefore it is pleadable in *London* and not here;” and for
 this he vouched 1 *Ed.* 4. where it was held that a *feme-covert* sole
 merchant is to be sued in *London* and not elsewhere, and he
 enumerated several other customs pleadable only in the city courts.
Walmsley for the Plaintiff did not deny the truth of the proposition,
 but took a diversity between the nature of the customs referred to
 and the one in question, *viz.* that the former were things executory
 and united to the courts in *London*, but that the latter was become
chose fort and allowable in law, and so pleadable in every place
 within the realm. Now, if the Court proceeded on that diversity,
 it will be impossible for the Plaintiffs here to argue that because the
 indenture of apprenticeship bound the infant in *Westminster-hall* that
 a *feme-covert* shall therefore be bound there also, since the very autho-
 rity on which the argument is founded proceeds on the distinction
 between those customs. At the end of the above case it is said

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that *Fleetwood* Serjeant and Recorder moved for and obtained a *procedendo* in an action on the custom for contribution (which had been removed from the city court into the *Common Pleas*); "for," says he, "the *Common Pleas* cannot do right upon the said custom;" the meaning of which clearly is, that an action grounded on a custom united to the courts in *London* does not lie in the courts in *Westminster-hall*, and I think that an authority for concluding that no declaration on that species of custom can be good in the courts above. Let us now look to the 1 *Ed. 4. 5. b.* referred to in *Stanton's* case. It was a writ of debt for tabling in *London*, and *Littleton* for the Defendant offered to wage his law; and on its being objected that it was for tabling in *London*, and that the Defendant by custom could not wage his law, *Littleton* urged that customs and usages which take effect in the court where the custom or usage is, and there begin to be of force, are only allowable in the court where they are used. This seems to be a good exposition of the expression employed in *Stanton's* case, of customs *executory and united to the courts in London*. *Billing* contended that the custom was allowable in the courts above, and said that a *feme-covert* sole merchant by the custom of *London* shall have an action without her husband, and an action shall be maintained against her alone without naming her husband, and that such custom is allowable here. But *Danby J.* denies this proposition, and says that all good customs are pleadable in bar here, as if there be a recovery in *London* upon the custom, we allow the plea and the custom; but when the Plaintiff brings his action upon a custom which lies in the cognizance and allowance of a special judge, such action is not maintainable here. In *Snelling v. Norton, Cro. Eliz. 409.* it was held a good plea to debt on bond brought against an administrator, that by the custom of *London* if one citizen contract to pay money to another, and he who contracts die, his executor shall be chargeable as upon obligation, and that the Defendant's intestate had so contracted, and that the Defendant as administrator had been sued on such custom, and having paid what had been recovered against him, had no further assets. The Court gave as the reason for their opinion that the custom had been executed against the Defendant. This is in perfect conformity to what was laid down by *Danby*: for a custom is executory which is united to a court, and it is executed when it has been acted upon by the court to which it is united. * In *Leache's* case, 16 *Jac. (a)*,

(a) The Reporters have not been able to discover from what book this case is cited.

the Court of *K. B.* said, "We in this court cannot examine the truth of the custom." The next case in point of time is *Langham v. le Femme de John Bewett*, *Cro. Car.* 67. *Heth.* 9. and *Littl.* 31. It was a *habeas corpus cum causa* to remove a *feme-covert* sued in *London* into the *Common Pleas*. Upon the return the custom of the city was stated: and though *Richardson*, Ch. J. who had taken bail *de bene esse*, on it being affirmed that she merchandized only for her husband, and was therefore out of the custom, and *Felverton*, J. thought that she ought to be discharged; yet *Hutton*, *Harvey*, and *Croke*, Justices, thought that "forasmuch as the writ had returned that she was sued in *London* as a *feme-sole* merchant according to the custom of *London*, it was such an action and cause wherewith this Court ought not to meddle nor take consuance, nor can give the party relief although he hath good cause of action: for in *London* they are judges of their own customs, and by intendment will proceed in their courts there according to their customs, and not otherwise; and therefore we ought not to take away their privileges, nor remove the action out of their court where we cannot give remedy in this." They also added, that "it is reason to accept bail where an action cannot be grounded on that contract in this court." And the cause was remanded. At the conclusion of the case is cited *Geppings v. Harding*, *M.* 26 *II.* 6. *Rot.* 344: the circumstances of that case are not stated, nor is it to be found in the year-book. Probably, however, it was an action of trespass for taking the Plaintiff's goods: the Defendant set up a delivery by the Plaintiff's wife as a sole merchant by way of defence, and issue was taken on this point, whether she were a sole merchant or not. And where the custom comes collaterally in question, there is no doubt that the courts both of law and equity will find the means of ascertaining what the custom is. Then came *Moreton v. Packman et Uxor*, 2 *Keble* 583. and 1 *Mod.* 26. where a *procedendo* being prayed because the husband was not joined in an action for ale sold, the Court said, they could not try whether selling ale be within the custom, "nor will any action lie here against her alone, nor will this Court take notice of those private customs." Now although this was a case of *procedendo*, yet the proposition that the action would not lie here against the wife alone, is laid down as generally as terms can express it, and includes the supposition of the custom being stated on the record. In *Roylson v. Ivory*, 3 *Keble* 302. a *procedendo* having been prayed in the case of a *feme-*

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covert, without the custom having been returned, the Court doubted whether they could remand the cause. With respect to their own jurisdiction they had no doubt, but they said that they must be ascertained of the jurisdiction of the Court below: however, the custom being alleged on the declaration, they held that sufficient, and awarded the *procedendo*. It is to be observed that the custom in this case was alleged in the declaration, and yet the cause was sent back to be tried in the city courts. So also in *Soan and Mace*, *Comb.* 42. *Holt*, in moving for a *procedendo* in an action against a *feme-sole* merchant in *London*, alleged that by the custom of *London* it must be tried there; and upon this observation, which is all that is material in the case, his motion was granted. The last of the older cases to which I shall refer is *Mrs. Pool's case*, 11 *Mod.* 253; where it was observed by the Court that as a *feme-covert* sole merchant "may be sued sole, so may she sue sole for debts owing to her within the city." But it is to be remarked that when we meet with the expressions of suing and being sued sole in the older books, they mean nothing more than this, that she may be sued in the manner in which a woman may be sued who is answerable without her husband: it does not therefore follow that the husband is not to be joined for conformity. I have not found any other authority on the subject till we come to the more modern decision of *Lavie* and another, assignees of *Jane Cox*, v. *Phillips* and others, assignees of *John Cox*, 3 *Burr.* 1776, and that is a material case. *John Cox* having become bankrupt, his assignees seized the goods of his wife *Jane Cox*, who had carried on trade after her marriage, as a sole merchant in *London*, and had also become bankrupt. The question was, Whether her separate effects could be applied towards the satisfaction of the debts of the husband in prejudice of her separate creditors? The question was not, Whether the wife could be sued in *Westminster Hall* without her husband? but it became necessary to examine the custom collaterally, in order to determine the right to the goods in question. The custom is there stated from the *liber albus*; which alleges, that if the husband and wife shall be impleaded, in such case the wife shall plead as a *feme-sole*. The custom therefore supposes the husband to be joined in the action, and I understand that in practice the husband is joined as to all acts before the plea, and particularly in naming the attorney. The question was argued by the late Lord Chief Justice *Eyre*, then Recorder of *London*, who seems to have had no conception that

that

that an action could be maintained in the city courts, unless the husband were joined for conformity. Mr. *Dunning*, who argued on the other side, put the right of suing and the liability to be sued as a sole merchant upon the same footing, ~~and~~ stated them both to be confined to the city courts. Lord *Mansfield* says, "The *feme-sole* trader in *London*, under this custom, must indeed bring her action in *London*, but such custom would be allowed in any other court in a defence by the husband." This is a clear exposition of the language used by *Walmsley* in *Stanton's* case, and by *Danby* in the year-book, that customs united to the city courts are executory and pleadable there only, but that such customs, if acted upon in those courts, may be pleaded in the superior courts as matter of defence. *Wilmot J.* says, "These customs, though local, are to be considered as allowable under the general law of the land when they come in question in other courts, though the action must be brought in the local court." And *Yates J.* says, "That an action on the custom can only be brought in the Mayor's Court of *London*, but the custom may be pleaded in bar in a superior court by way of defence, and in such cases the superior court will take notice of the custom." The language here used with respect to the custom being put on record by way of a defence, will not support the proposition, that when the custom is made the ground of action, it may be allowed in the superior courts, because put upon the record: for it is impossible to suppose that these great and learned persons would have stated the manner of putting the custom on record by way of defence, and at the same time have treated it as incapable of being made the ground of action. Indeed, Mr. Justice *Blackstone*, in his report of the same case, p. 574. states Lord *Mansfield* to have said, "Any action that is brought against the wife by her creditors must be in the city courts; but the custom being a good one, use may be made of it in any court in the kingdom." And the words of Mr. Justice *Yates*, according to the same report, are still stronger, and shew with what diligence he had looked through the older cases, without a knowledge of which they are not altogether intelligible: His words are, "Custom of *London* may be pleaded in bar: while the custom is executory, it can only be alleged in the Mayor's Court; when executed, it may be pleaded in any other court." And it appears that the Court there considered the custom as executed, in the circumstance of the assignees of the wife having possessed themselves of her property, and that the custom was therefore examinable in the superior courts

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courts in a case where it came collaterally before them. The next case to be considered is *Read v. Francis Jewson*, as stated by Mr. Justice Buller in 4 *Term Rep.* 362. That was a motion to set aside a judgment entered upon a warrant of attorney given by the Defendant a sole trader under the custom of *London*, at the same time with a bond in which she was described milliner, citizen, and sole trader. In the judgment it was stated, that she was a *feme-covert* sole trader, and that the money mentioned in the bond was advanced to her touching her craft. The objections to the judgment were, that it was not entered pursuant to the authority, that the husband ought to have been impleaded jointly with the wife, though execution must be against the wife only; and that the action was not maintainable in the *King's Bench*, but ought to have been brought in the court of the city of *London*: the Court thought that the husband alone could be prejudiced by the judgment, and had a right to bring a writ of error to reverse it, but if he acquiesced they were inclined to think that the judgment ought to stand. However, they ordered the case to stand over in order to hear what the husband had to say: and when the matter came on again the husband appeared, and declared that he consented to the motion. Lord Mansfield then observed, that it was an application to set aside a judgment entered up *without authority*. He observed also, that no instance had been shewn in which a *feme-covert* sole trader could execute a bond; and though she is liable to simple contract debts, she cannot give a bond. And he went further and said, "A married woman cannot be made Defendant without her husband." Whatever may have been determined in subsequent cases, we have here the authority of Lord Mansfield himself for this proposition, that in an action on the custom of the city of *London* a married woman cannot be made Defendant without her husband. Lord Mansfield also says, "She cannot give a warrant of attorney to confess judgment; and if she cannot, how can she make an attorney in *Westminster-hall*?" Mr. Justice Allon added, "By the better authority it seems that the action ought to be brought in the city courts, and the husband ought to be joined. It is a principle of the common law that a woman shall never be put to answer without her husband." And he concluded with saying, that the warrant of attorney "was an absolute nullity." The case of *Pope v. Vaux*, 2 *Bl.* 1060. may be cited to shew that it was considered to be a matter of course to remand an action upon the custom removed from the city court

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into the Court at *Westminster*. Lord Ch. J. *De Grey* in the case of *Hatchett v. Baddeley*, 2 Bl. 1081. says, The general law is, that a *feme-covert* can neither sue nor be sued alone; and, amongst the exceptions to that rule, takes notice of local customs, "as in the city of *London*, where a *feme-covert* being a sole trader may be sued; but there the husband must be joined in the action at the outset for conformity." The first case in which the question, whether a *feme-covert*, having a separate maintenance, could be sued without her husband, seems to have distinctly arisen, is *Lean v. Schultz*, 2 Bl. 1195. The case, indeed, was decided on the form of the record rather than on the real merits of the question; but there are some passages which are very material. The Court say, "The whole is totally vicious, as the husband is not party to the record: and there is no instance in the books of an action being sustained against the wife, the husband being living, at home, and under no civil disability." Whether this proposition be maintainable as the law stands at the present day, or whether deeds of separate maintenance, (if that can be called a deed which is executed by a married woman,) have introduced an exception to it, I do not pretend to determine. But the very next passage in that judgment is, "even by the custom of *London*, though the wife and her effects are alone liable to execution if she be a sole trader, yet the husband must be a co-defendant. And though a wife may acquire a separate character by the civil death of her husband, as by exile, profession, or abjuration; yet by a voluntary separation she does not acquire such a character as may be called a civil widowhood, nor is taken notice of by the law as such." Then came the case of *Ringstead v. Lady Lancashire* (a): notwithstanding the difficulties stated by Mr. Justice *Blackstone* at the end of *Hatchett v. Baddeley*, as resulting from the doctrine of allowing a *feme-covert* to be sued alone, and notwithstanding what was said in *Lean v. Schultz*, yet in *Ringstead v. Lady Lancashire* those two cases were considered as having decided nothing in a case of a married woman having a separate maintenance by deed. If that case be law, it is perhaps the only instance in which the husband and wife may not plead *non est factum* to a deed executed by the latter. But admitting that case to be good law, yet it does not follow that in the particular case before the Court a *feme-sole* trader can be sued without her husband in *Westminster-hall*, unless it can be made out that the custom of the city does not require the husband to be

(a) *Cooke*, B. L. 26. ed. 4.

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joined in the city courts, or unless it can be shewn that she stands on the same footing in *Westminster-hall* as if she had executed a deed of separation. That such was not the opinion of Lord Mansfield appears from his own words in *Ringstead v. Lady-Lanesborough*, which I state from a note of that case with which I have been favoured by my Brother Buller. "This case," he says, "is not analogous to the case of a *feme-sole* trader in London. There the husband has not given up the right to the society of his wife, or to her property in trade." Then I find the authority of Lord Mansfield for saying, that if that had been the case of a *feme-sole* trader, the husband must have been joined. I have also been favoured with a note of *Barwell v. Brooks*, from the same learned judge. In that case, and as I think for the first time, we find a proposition stated which was made use of in the course of the argument for the Plaintiffs in this case, namely, that it is absurd to join a party in the action against whom there can be no judgment. This is the only *scintilla* of a principle which I have been able to find anywhere to support the proposition that the husband ought not to have been made a party to this suit. If this objection be valid, it applies strongly to this case; for certainly there can be no judgment against the husband here. But the question is, Whether upon the authority of this single dictum we are to overturn the series of determinations which I have traced from the 1 *Edw. 4.* to the present day. Soon after this *Corbett v. Poelnitz*, 1 *Term Rep.* 5. was decided. These three cases certainly tend to establish this point, that a married woman, having a separate maintenance by deed, may make an attorney in the courts of *Westminster-hall* as if her husband was professed, exiled, or had abjured the realm, or as if she had never been married. Without saying one word more on these cases, which are likely soon to come under discussion before all the judges; (a)—without presuming to say how the difficulties enumerated by Mr. Justice Blackstone in *Hatchett v. Baddeley*, and the additional difficulties stated by the Master of the Rolls in *Hyde v. Price*, 3 *Vez. jun.* 437. are to be surmounted, or how these cases are to be reconciled with the judgment of the Court in *Lean v. Schultz*, or with the policy of the law of this country, respecting the relations which it forms in private families, constituting toge-

(a) At this time the case of *Marshall v. Mary Rutton*, in which judgment has since been given in *K. B.* (see 8 *Term Rep.* 545.) was pending before the twelve judges. The decision in that case establishes, that a *feme covert* living apart from her husband, and having a separate maintenance secured to her by deed, cannot contract or be sued as a *feme sole*.

ther that great family called the public;—without inquiring how far in these cases the Courts of Common Law have given a remedy against a married woman beyond what the Courts of Equity would afford;—without examining how it is to be argued that a *feme-covert* can execute a deed of separation, when, in order to execute any deed, she ought to be a *feme-sole*;—without inquiring how we are to maintain that her contracts are good, because she is in a state of separation, her existence in that state originating in a deed or contract executed and entered into before she is separated;—without saying what answer we are to give to the Ecclesiastical Courts if, upon a suit for restitution of conjugal rights, they should hold that it is not in the power of the parties themselves to dissolve by voluntary separation this obligation to discharge the duties arising out of that particular contract which was formed in the presence of God;—without inquiring, whether if those Courts should refuse to admit, as a cause of separation, any circumstances upon which they would not decree a separation, the Courts of Common Law would grant a prohibition to prevent their proceeding in a suit for restitution of conjugal rights;—without examining how far the case of *Rex v. Mead*, 1 Burr. 542. which establishes, that a man having agreed to live separate from his wife, shall not by force compel her to return to him, has or can have established that a deed of separation executed by a *feme-covert* binds her as her deed, and as effectually as if she was single, and ought to be enforced by courts of justice through all its consequences;—without examining at present what is the true principle to be deduced from these and all the subsequent cases capable of being applied to the contracts of married women having executed deeds of separation, and having certain and ample or reasonable maintenances, or having uncertain or insufficient provisions, having property, or not having property by the gift of the husband, having annual allowances undiminished or altogether anticipated by reasonable or unreasonable expence;—without examining how these and all the subsequent cases can possibly be reconciled, and how far we can apply that principle, whatever it may be when once ascertained, only to the contracts of such married women, or to their other acts also of whatever nature, or how it is to be applied to their property;—without saying more on these cases, it is enough for me to take notice that Lord Loughborough in *Compton v. Collinson*, 1 H. Bl. 350. has expressed himself of opinion that the cases alluded to are not to be considered as completely settled, and that the same learned Lord in a subsequent case of *Legard v. Johnson*, 3 Vez. jun. 358.

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declared that he had infinite difficulty in conceiving it possible to decree performance of a deed of separate maintenance;—it is enough for me to observe, that in *Hyde v. Price*, 3 *Vez.* jun. 444. as laborious and diligent a judge as ever sat in *Westminster-hall*, the present Master of the Rolls, (after adverting to the cases of *Corbett v. Poelnitz*, *Hatchett v. Baddeley*, and *Lean v. Schultz*, and observing, that Mr. Justice *Blackstone*, in his last edition of his commentaries, continued to state his text conformably to the opinion delivered by him in the Court of *Common Pleas*, and after referring to *Caudell v. Shaw* and *Read v. Jewson*, to obviate the conclusion that it is so fully established as the editor of the last edition of the Commentaries, supposes, that a *feme-covert* with a separate maintenance by deed is to all intents and purposes a *feme sole*;) says thus much, “In every one of the cases that have occurred it has “been uniformly understood, that the act of the wife, or of the “husband and wife jointly, cannot either by custom or contract, or “otherwise, make her a *feme-sole* so as to be subject to the process “of the law as such, and to be sued as *femes-sole* are sued. “The same doctrine as that of *Corbett v. Poelnitz* came before “the Court of *King’s Bench* in *Gilchrist v. Brown*, 4 *Term Rep.* “766. and *Ellab v. Leigh*, 5 *Term Rep.* 679. The Court “evaded the question how far *Corbett v. Poelnitz* was to be “acquiesced in to its full extent: but Lord *Kenyon* shews, that “he entertained a doubt upon the subject; which is all I wish “to have understood; that it may not be considered as “quite acquiesced in.” I conclude, therefore, that these cases are not settled; and even if they were settled, still if the custom of *London* be that the husband must be joined with the wife to the extent of making the attorney who is to defend her, these decisions will decide nothing as to the case of a *feme-sole* merchant in *London* sued without her husband in *Westminster hall*. This brings me to the case of *Caudell v. Shaw*, which is the last I shall have occasion to mention, and which was subsequent in point of time to *Corbett v. Poelnitz*, and the other two cases on which I have observed. That case proves that a *feme-covert* sole trader in *London* cannot sue without her husband in the courts at *Westminster*. And if this be so, I think the converse necessarily follows, that she is not liable to be sued there without him. In this view of the case it becomes unnecessary to advert to what has been intimated upon the count upon an account stated. With respect to the argument of inconvenience, which has been urged, it is sufficient to say, that if the

law has decided that a *feme-sole* trader in *London* can not be sued elsewhere than in the city courts, those who deal with her must take their remedy as the law has given it to them. Whatever may be the effect of the prevailing fashions of the times, I do not think that the argument of inconvenience, arising out of those fashions, can at any time be relied upon against a current of decisions: and I am ready to say, that if the policy of the law has withheld from married women certain powers and faculties, the courts of law must continue to treat them as deprived of those powers and faculties, until the legislature directs those courts to do otherwise. Much of what has been said ought perhaps to be considered as affecting my judgment only: upon the whole, however, we are all of opinion, that the judgment of the *King's Bench* in this case must be reversed.

Per Curiam,

Judgment reversed.

STEVENSON v. DANVERS.

Feb. 8th.

THE Defendant in this case was arrested on a writ sued out against him by the name of the Honourable *George Augustus Richard Danvers*, and a bail bond was entered into by which the Honourable *Augustus Richard Butler Danvers*, arrested by the name of *George Augustus Richard Danvers*, together with his bail, became bound to the Sheriff of *Middlesex*, in the sum of 8000*l.* conditioned for the appearance of the said *Augustus Richard Butler Danvers*, arrested by the name of *George Augustus Richard Danvers*. The real name of the Defendant was *Augustus Richard Butler Danvers*, and in that name the affidavit to hold to bail was made.

On account of this variance in the process, a rule *nisi* was obtained on a former day, to discharge him, on entering a common appearance, and at the same time the Plaintiff in the action obtained a rule *nisi* to amend the writ.

In support of the former rule *Shepherd* Serjt. contended, that the writ must be founded on the affidavit to hold to bail, for that as by the 5 *Geo. 2. c. 27.* no person can be holden to bail for any sum under 10*l.* without an affidavit, in this case either the writ or the affidavit must be held to be good for nothing, and the Court must either supply a new affidavit or a new writ. He urged that if the amendment were allowed it would operate to the injury

A. B. having been arrested, on a *capias* sued out against him by the name of *B. C.*; a bail-bond was given, by which *A. B.* arrested by the name of *B. C.* became bound, conditioned for the appearance of *A. B.* arrested by the name of *B. C.* The affidavit to hold to bail named the Defendant properly *A. B.* The Court amended the *capias* and return, and rejected an application by the bail, to set aside the bail bond: but without prejudice to the Sheriff.

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of the bail, who might have been willing to enter into the bail bond having a knowledge that the writ was defective, but would not have done so otherwise. He added that in this case there was nothing to amend by as the affidavit to hold to bail does not appear upon record.

Bayley Serjt. *contra*, cited *Browne v. Hammond*, *Barnes* 10. *Hunt v. Kendrick*, 2 *Bl.* 836. *Newenham v. Law*, 5 *Term Rep.* 577. *Bourchier v. Wittle*, 1 *Il. Bl.* 201. and *Carr v. Shaw*, 7 *Term Rep.* 299.

The Court thinking that as the affidavit to hold to bail was right there could be no question arising upon the statute which requires the affidavit to hold to bail, and that the writ might be amended thereby, discharged the rule for entering a common appearance, and made the rule for the amendment absolute, without prejudice to any application which the bail might make on their own behalf.

Afterwards *Shepherd* on the part of the bail, obtained a rule to shew cause why the bail bond should not be cancelled; and *Bayley* at the same time obtained a rule to shew cause why the sheriff should not amend his return in order to make it conformable with the amended writ.

When these rules came on to be discussed *Shepherd* was called upon by the Court to begin. Unless the arrest was warranted by the process at the time when it was made, it must be bad altogether; and giving a bail bond can be no waiver of any defect in that process. The distinction is between an irregularity and a defect in the process; the former of which may be waved, but the latter not. *Goodwin v. Parry*, 4 *Term Rep.* 577. and *Huffey v. Wilson*, 5 *Term Rep.* 254. Indeed in every case of an application to cancel the bail bond for an irregularity in the proceedings, the argument would apply that the irregularity has been waved by the act of giving a bail bond. In fact waiver is doing something after an irregularity committed, where the irregularity might have been corrected before such act done. Analogous to the rule in the cases cited, is that which has been adopted in the case of supplemental affidavits, which are always refused where the original affidavit is defective, and only allowed where they are ambiguous, *Green v. Redshaw* (a). The engagement of the bail is, that the Defendant shall appear if he has been properly arrested (b).

(a) *Ante*, vol. 1. 228.

(b) In *Gardiner v. Dudgate*, 2 *Show.* 51. } is to make the Defendant appear according to the writ, and not according to the condition of the bond."

Bayley was stopped by the Court.

¹ Best Serjt. on the part of the sheriff observed, that by the statute of 23 H. 6. c. 9. the bail bond, and the process must correspond; that in the present case the bail bond did correspond with the process as originally issued, but that in consequence of the amendment which had taken place, a variance had been created between the writ and the bail bond, which would prevent the sheriff from bringing an action on the latter.

Upon this the Court discharged the rule for cancelling the bail bond, and made absolute the rule for amending the return, but ordered that it should be inserted as a term in the latter rule, that no proceedings should be had against the sheriff without special notice being first given to the Court.

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THIS was an action for return of premium. The policy was on the ship *Ceres* "at and from *Oporto* to *Lynn*, with liberty to touch at one port before *Lynn*, to deliver wines, and to proceed and sail to and touch and stay at any ports or places whatsoever on the coast of *Portugal* to join convoy particularly at *Lisbon*;" with this clause on which the present question arose, "at the premium of twelve guineas *per cent.* to return 6*l.* if the *Ceres* sail with convoy from the coast of *Portugal* and arrive (a)."

Policy on the *Ceres* "at and from *Oporto* to *Lynn*, with liberty to touch at any ports on the coast of *Portugal* to join convoy particularly at *Lisbon*; at 12 guineas *per cent.* to return 6*l.* if the *sail* with convoy from the coast of *Portugal* and arrive." The *Ceres* sailed from *Oporto* with a sloop and cutter appointed to protect the trade of

The cause was tried before Lord Eldon Ch. J. at the Guildhall Sittings after Michaelmas Term, when the following circumstances appeared in evidence.—Lord St. Vincent having the command on the *Lisbon* station, and finding himself unable to afford separate convoys for *England* to all the ports upon the coast of *Portugal*, directed the *Speedy* cutter and *King's-fisher* to go to *Oporto* and convoy the trade of that place from thence to *Lisbon*, where they were to lie in the bay *Doyras*, without entering the port of *Lisbon*,

that place to *Lisbon*, from whence it was to proceed with the *Lisbon* trade under a larger convoy for *England*. In the way from *Oporto* to *Lisbon* the fleet was dispersed by a storm, and the *Ceres* judging for the best, run for *England* and arrived. Held that the assured was entitled to a return of premium.

(a) At the time the rule nisi was obtained in this cause, a like motion was made in a case of *Everard v. Hellingworth*, the circumstances of which were precisely similar with this, except that in the clause for return of premium the words used were "depart with convoy from *Portugal*" instead of "sail with

convoy from the coast of *Portugal*." The two cases were now argued together, but it was admitted by the bar and the bench that the two expressions were the same in effect, and that the same construction must prevail in both cases.

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so as to become chargeable with the *Lisbon* duties. From that place the *Romulus*, *Argo*, and *Alliance* were ordered to convoy the whole trade on their way to *England*; and off the *Scilly Isles* the *Romulus* was to leave them, and protect the ships bound for *Ireland* to their place of destination. The *Oporto* fleet in proceeding to *Lisbon* being dispersed, lost the convoy, and the *Ceres* then judging for the best, run for *England* and arrived. At the time when the captains of the *Oporto* trade left that port, they conceived that they were to proceed direct for *England*, and did not learn the contrary until they received their sailing instructions. It was within the knowledge of all parties when the policy was underwritten, that the coast of *Portugal* was much infested with privateers. The counsel for the Defendant contended, that the *Ceres* never left the coast of *Portugal* with convoy. The Lord Chief Justice directed the jury, that as the *Oporto* trade had put themselves under the convoy of the *Speedy* cutter and *King's-fisher* which formed one part of the aggregate convoy for *England*, they had thereby deprived themselves of all power of acting for themselves, and had therefore taken their departure from the coast of *Portugal* with convoy. He observed that the liberty given to the *Ceres* by the policy to touch at other ports on the coast of *Portugal*, did not vary the inference with respect to her being under convoy for *England* from the moment that she received sailing instructions. A verdict was found for the Plaintiff, with liberty to the Defendant to move for a nonsuit.

Accordingly a rule *nisi* having been obtained for that purpose on a former day;

Shepherd and *Bayley* Serjts. now shewed cause. It appears from the cases that a ship is held to have sailed on her voyage when she has quitted her port of loading. *Bond v. Nutt*, *Cowp.* 601. and *Tbelluffon v. Ferguson*, *Doug.* 361. And if she sail with a convoy appointed by Government, however that convoy be constituted, it is a fulfilment of a warranty to sail with convoy. *Smith v. Redshaw*, *Park. Insur.* 349. and *De Garay v. Claggett*, *ibid* (a). These authorities shew that the *Ceres* did depart from *Oporto* with convoy for *England*. All connection with the coast of *Portugal* was at an end as soon as she had taken her departure from *Oporto*; and though she was proceeding to the Bay *Doyras* in pursuance of her sailing orders at the time when the fleet was dispersed, she was

(a) *Vid. et. D'Eguino v. Bewicke*, 2 *H. Bl.* 351. *Park. Insur.* 349. a. and *Hibbert v. Pigow*, *ib.* 339.

not the less upon her voyage to *England*. Had she been ordered by her convoy to pursue any other course, she must have obeyed, and though the course prescribed might have been very much out of her way, yet she would not have been guilty of a deviation. The clause for return of premium on which this question arises must receive one of three constructions; 1st, if the ship sail with convoy from that port on the coast of *Portugal* from which the *Oporto* convoy shall sail; 2dly, if she sail with convoy from any port on the coast of *Portugal*; and 3dly, if she sail with convoy from the last port on the coast of *Portugal*, at which the convoy shall touch. If either of the two former constructions be correct, the Plaintiffs are entitled to recover; and it is hardly to be supposed that the underwriters when the policy was effected contemplated the third, since it was well known to them that the coast of *Portugal* was infested with privateers, and it was not therefore their interest to allow the *Ceres* to go from *Oporto* to *Lisbon* without convoy, in order to gain the return of premium by departing from thence with convoy.

Vaughan and *Lens* Serjts. in support of the rule. It may be admitted that when the *Ceres* sailed from *Oporto* with the *Speedy* cutter and *King's-fisher*, she sailed with convoy on the voyage insured. The question is, whether the sailing from *Oporto*, was a sailing from the coast of *Portugal*? That was a condition precedent, and unless strictly complied with the Plaintiff cannot recover. The underwriters appear to have had two risks in contemplation; 1st, while the ship was on the coast of *Portugal*, touching and staying at the ports there, until she had taken her final departure from thence; 2dly, from such final departure till her arrival in *England*: and it was in consideration of being relieved from a part of the latter risk that the premium was to be returned. Now though it may be allowed that in a general sense the convoy from *Oporto* was a convoy for *England*, yet it may also be considered in a more limited sense, as a convoy along the coast of *Portugal*: and it is very clear that the underwriters did not mean the proviso for a return of premium to attach until the *Ceres* had taken her departure from the coast with convoy across the *Atlantic*. A policy of insurance is an instrument in which matters are expressed with peculiar conciseness. The Court therefore will be inclined to give effect to every word employed: but in this case the words "from the coast of *Portugal*" must be struck out, unless they be construed to mean "from the district of *Portugal*."

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Lord ELDON Ch. J. After all the consideration which I have been able to bestow upon this subject, I remain of the same opinion which I entertained at the trial, and therefore think that the case was properly decided by the jury. The case is neither more nor less than this. From the disposition of the enemy's force it happened that we had many merchant ships collected in the various ports of *Portugal*. Lord St. Vincent as commander upon that station, was to provide a convoy for them in such a manner as he should think best. With respect to many of those ships, it could hardly be ascertained, at the time when the policies were underwritten, in what ports they were; though indeed it was understood that the *Ceres* was at *Oporto*. The uncertainty therefore under which the parties laboured, respecting the manner in which the convoy would be formed, and the place from which it would depart, created the necessity of employing the expressions which have been introduced into this policy. The assured agreed that on the ship being insured from the port in which she then was to *Lynn*, the underwriter should have 12 guineas *per Cent.*; but that in case the voyage was undertaken with convoy, there should be a return of 6*l. per Cent.* It being unknown from what port on the coast of *Portugal* the convoy would sail, the clause for the return of premium was to be adapted to the circumstances of the case. The departure with convoy might be from *Oporto*, or it might be from some other place; it became necessary therefore to introduce some expression, which extended to something more than a mere departure from *Oporto*. Had the insurance been from *Portugal*, the introduction of the words, "from the coast of *Portugal*," might have furnished an argument in the Plaintiff's favour. But the insurance being from *Oporto* which is a port on the coast of *Portugal*, it may be inferred that the assured intended to claim a return of premium, not only if the ship departed from *Oporto* with convoy, but if she departed with convoy from any port on the coast of *Portugal*, not excluding *Oporto*. With respect to the liberty given by the policy to touch and stay at any ports on the coast of *Portugal*, I think it quite clear that when the ship departed from *Oporto* with convoy, that liberty was at an end. It must be understood that such liberty was given to the *Ceres* when not under convoy; for then only would she be in a situation to exercise it. Having in this case departed from *Oporto* with convoy, the policy must be considered as if the above mentioned liberty had never been conceded. The only fair interpretation of the agreement is, that the

assured should have the benefit of the policy, though she sailed from *Oporto* without convoy, but that if the *Geres* sailed from *Oporto* which is on the coast of *Portugal* with convoy, then there should be a return of premium.

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HEATH J. This question is new in specie, because it has arisen on a transaction which never happened before. It had been usual for ships to go from *Oporto* to *Lisbon* to meet with convoy. But in the present instance it was thought proper on account of the number of privateers, to send the *Speedy* cutter and *King's Fisher* to collect the trade. There are however established principles on which this case must be decided. It has always been understood that provisions for a departure with convoy have relation to the custom of trade and the orders of government, and ought therefore to receive a liberal construction. There are many instances in *Park's Insurance* where ships having been warranted to depart with convoy from the port of *London*, but the convoy having been appointed to sail from the *Downs*, or from *Spithead*, reference has been had to the orders of government, and the warranties have been held to be fulfilled by joining convoy at those places (a). It was contended that we should in effect strike out some of the words of the policy if we decided in favour of the Plaintiff; but that argument if just, would apply to those cases to which I have alluded where ships have been warranted to depart with convoy from the port of *London*. The question is, what was to be the *terminus a quo*? as to which I think the cases cited are directly in point. I am clearly of opinion that the event has happened on which the contract for a return of premium was to attach, and if any doubt could be entertained upon the words, they must be construed most favourably for the assured. The underwriters engaged to return the premium and *verba fortius accipiuntur contra proferentem*.

ROOKE J. Since this case was first moved for I have entertained some doubts upon the subject, but am now satisfied that the verdict is right. The premium was given on a war risk: the *Geres* therefore was at liberty either to touch and stay at any of the ports of *Portugal*, with a view to obtain convoy, or to sail direct for *England* without convoy; but if she obtained convoy then a part of the premium was to be returned. Now in this case there was a convoy appointed by relays to protect the trade to *England*; and

(a) *Vid. Lushier's case* 2 Salk. 443. and *Gordon v. Morley*, 2 Str. 1265. and *Park. Insur.* 344.

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the captain of the *Ceres* having sailed with that convoy with a *bonâ fide* intention to proceed for *England*, the proviso for a return of premium has been complied with. Had the ship been warranted to depart with convoy, she would have been under the necessity of leaving *Oporto* with the *Speedy* cutter and the *King's Fisher*; and her so doing would have amounted to a fulfilment of the warranty. It is true that the policy is made by the broker of the assured; but the undertaking to return the premium, is the the undertaking of the underwriters and must therefore be construed most strongly against them.

Rule Discharged.

Feb. 11th.

WHITE v. WILSON.

Declaration by a sailor for wages and the average price of a negro slave earned "during a certain voyage from the port of *London* to the coast of *Africa*, and from thence to the *West Indies*," at the trial it appeared from the articles that the voyage was, "from the port of *London*, upon an intended voyage to the coast of *Africa* for slaves from thence to the *West Indies* or *America*, and after wards to *London* in *Great Britain*, or to her delivering port in *Europe*," and that no mention was made in the

ASSUMPSIT. The 1st. count of the declaration stated "that heretofore, to wit, on, &c. at, &c. in consideration that the Plaintiff on the retainer and at the special instance and request of the Defendant, would enter himself and serve as chief mate of and on board a certain ship called the *Swallow*, whereof the Defendant was master, during a certain voyage, to wit, a certain voyage from the port of *London* to the coast of *Africa*, and from thence to the *West Indies*, which the said ship was then about to make, during which said voyage certain negro slaves were intended to be purchased on the coast of *Africa*, and to be carried and conveyed from thence in the said ship to the *West Indies*, and there to wit in the *West Indies* aforesaid to be sold, he the Defendant undertook and promised the Plaintiff to pay him at and after the rate of 6*l.* by the month, for each and every month during the said voyage, and also so much money as should be the average price, at and for which one of the said negro slaves, so to be purchased, carried, conveyed and sold as aforesaid, should be sold in the *West Indies* aforesaid;" it then averred that the Plaintiff did enter himself as chief mate, and that the ship sailed from *London*, on her said intended voyage, "and in the course thereof proceeded to *Africa* aforesaid, and from thence to the *West Indies*, aforesaid, and there to wit, at the *West Indies* aforesaid, afterwards, to wit, on, &c. completed and ended the said voyage, the same having continued a long space of time, to wit, the space of eleven months";

articles of the average price of a negro slave: Held that the variance between the description of the voyage in the declaration and the articles was fatal, though the captain put an end to the voyage in the *West Indies*, and discharged the crew there, and though the description of the voyage in the declaration was under a *felicitat*; held also that the contract for the average price of a negro slave in addition to the wages was void, not being included in the articles according to the 2 *Geo. 2. c. 30.*

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that the Plaintiff served as chief mate during the said voyage; that divers negro slaves were purchased on the coast of *Africa*, and carried to the *West Indies*, and there sold, and that the average price for which they were sold was 53*l.*; that by reason of these premises the Plaintiff became liable to pay 66*l.* in respect of the monthly wages, and 53*l.* as the average price of a negro slave. The 2d. count stated the Defendant to have promised "that over and above certain sums of money, at and after a certain rate by the month then and there agreed to be paid by the Defendant to the Plaintiff, in respect of his said service during the said last-mentioned voyage, he the said Defendant would pay to the said Plaintiff, so much money as should be the average price, at and for which one of such negro slaves to be purchased carried conveyed and sold as last aforesaid, should be sold in the *West Indies* aforesaid;" in all other respects it resembled the 1st count. There were also counts in *indebitatus assumpsit* for wages, work and labour, money paid, had and received and on an account stated. Plea, *Non assumpsit*.

At the trial before Lord Eldon Ch. J. at the *Guildhall* sittings after last *Hilary Term*, it appeared on the production of the ship's articles that they were intitled "Articles of agreement between the master, officers, mariners, seamen and seafaring men of the ship *Swallow*, bound from the port of *London*, upon an intended voyage to the coast of *Africa* for slaves, from thence to the *West Indies*, or *America*, and afterwards to *London* in *Great Britain* or to her delivering port in *Europe*;" and that the rate of wages inserted in them, agreed with that claimed in the 1st count, but no mention was therein made of any sum of money to be paid to the Plaintiff, as the average price of a negro slave. It was then proved that the chief mate on board ships employed in the slave trade, usually receives in addition to his wages the average price of one, or two negro slaves according to his contract, provided he does not misbehave himself, and that in this case the Defendant had agreed to allow the Plaintiff the average price of one negro slave beyond his wages. It was also in evidence that the captain on his arrival in the *West Indies*, broke up the voyage and discharged the crew. Two objections were made to the Plaintiff's recovery; 1st, that as the 2 *Geo. 2. c. 36.* had provided that all agreements for wages between captains and their crews should be made in writing, the contract for the average price of a negro slave, could not be superadded to the articles: 2dly, that there was a material variance between the descriptions of the voyage in the declara-

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tion, and the evidence. A verdict was found for the Plaintiff with liberty to the Defendant to move for a nonsuit.

A rule *nisi* for that purpose having been obtained;

Lens and *Bayley* Serjts. now shewed cause; and observed that the articles produced at the trial which bore date the day after that on which the 37 Geo. 3. c. 90. imposing a new stamp, took effect, had only the old stamp; they contended therefore, that as by the 2 Geo. 2. c. 36. §. 8. it is provided, that the articles shall be produced by the master, and that the seaman shall not fail in his suit for want of such articles being produced, the fair construction of that clause was, that the articles should be produced in such a state as to be good evidence, but that not having the proper stamp in this case, they must be considered as not having been produced at all, and consequently the objection of variance between the declaration and the articles did not arise. [But the Court said, that if the Plaintiff were permitted to go into parol evidence wherever the articles produced were on an improper stamp or otherwise defective, it would amount to a repeal of those legislative provisions which direct that such agreements shall be in writing and in a certain form]. They then contended, 1st, that the 2 Geo. 2. c. 36. applies only to contracts for wages in the strict sense of the word, and not to any collateral perquisites agreed upon between the parties, which need not be specified in the articles; 2dly, with respect to the variance, that the contract in question was originally in the alternative, and might terminate in the *West Indies*, and therefore the voyage which was the true consideration of the Plaintiff's demand, and so understood between the parties, was correctly set out; or at any rate being only introduced in that part of the declaration, which states the inducement for making the contract, and under a *scilicet*, it might be rejected as an immaterial averment (a); for as it would have been sufficient to have alleged generally "a certain voyage," and then to have proved that voyage from whence the earnings accrued, the declaration might be read so as to avoid the variance by leaving out the description of the voyage. They observed that in *Bristow v. Wright*, Doug. 665. the variance which was there held fatal, was not under a *scilicet*, and referred to the several cases of *Savage v. Smith*, 2 Bl. 1101. *Fritb v. Gray* cited in the note to *Drewry v. Twiss*, 4 Term Rep. 561. and *Peppin v.*

(a) If an averment be material, putting it under a *scilicet* will never make it immaterial. *v. Barritt*, 6 Term Rep. 460. *Johnson v. Pickett*, E. 25 Geo. 3. B. R. cited per *Lanau-remet J.* 6 Term Rep. 463.

Solomons, 5 *Term Rep.* 496. to shew that an averment need not be proved where the declaration can be deemed perfect without it.

Shepherd and *Vaughan* Serjts. *contra*, after citing *Webster v. De Taslet*, 7 *Term Rep.* 157. where three privilege slaves agreed to be given in addition to wages, were held to be wages, and therefore not insurable, were stopped by the Court.

LORD ELDON Ch. J. I was rather of opinion at the trial, that this voyage was capable of being represented merely as a voyage from *London* to *Africa* and from thence to the *West Indies*: and that although the voyage described in the articles was a voyage from the port of *London* to *Africa*, from thence to the *West Indies* or *America*, and afterwards to *London* in Great Britain or to her delivering port in Europe, yet that the latter part of the description was not binding in a case in which there was no delivering port in Europe, the captain having broken up the voyage in the *West Indies*, according to the option which seemed to have been vested in him. I doubted whether it was not a contract in the alternative; and if so, whether it was not sufficient to describe that voyage which had really taken place (a). I am now, however, inclined strongly to a contrary opinion, and think that the declaration should have specified the agreement as it was stated in the articles. The contract in the alternative should have appeared upon the record, and the fact of the voyage having terminated in the *West Indies* should have been averred. And this will be found to be the more necessary, if we attend to the policy of the various acts of parliament which have provided different forms of articles for different voyages. With respect to the additional perquisite of the average price of a negro slave, it is impossible to consider it in any other light than that in which it was considered in *Webster v. De Taslet*, namely, as wages. If the legislature have decided that all agreements for wages shall be in writing, and the practice be not to put in writing

(a) See *Layton v. Pearce*, Doug. 15. where it was decided in the case of an alternative contract, that the party who had not the option, could not state it as an absolute contract. Lord Mansfield, indeed, there laid down that if the option had been in the party pleading, it had been otherwise. On the authority of this dictum, it was contended, in *Churchill v. Wilkins*, 1 *Term Rep.* 447. that a contract in the alternative, where the option is in the party pleading, may be stated as an absolute contract; and this seems to have been admitted by Buller J.; for his rea-

soning went to shew that the contract in that case which was "to deliver talow at 4 s. per stone, and so much more as the Plaintiff paid to any other," was not a contract in the alternative, but merely a contract depending on a contingency, and therefore not within the above rule applicable to alternative contracts. However, in the subsequent case of *Tate v. Wellings*, 3 *Term Rep.* 531. the Court held, that the Defendant could not plead a contract, which was in the alternative, as an absolute contract, though the option was in himself.

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contracts for the price of one, two or more slaves, that practice, if allowed to prevail, may be made the means of evading the provisions of the act.

HEATH J. I am of the same opinion. It is not sufficient for the Plaintiff to state in his declaration "a certain voyage," as the consideration of his wages; but he must specify what that voyage was.

ROOKE J. Of the same opinion.

Rule absolute.

Feb. 11th.

GOODTITLE *ex dem.* WANKLEN v. BADTITLE.

Affidavit of service in ejectment made by a person who saw the declaration served and heard it explained, to the tenant in possession is sufficient to entitle the Plaintiff to judgment against the casual ejector.

WILLIAMS Serjt. moved for judgment against the casual ejector, and mentioned that the affidavit of service was not made by the person who served the declaration, but by a person who swore, that he saw the tenant in possession served, and heard the person who served him with it acquaint him with the true intent and meaning of the declaration and notice.

The Court held this affidavit sufficient.

Feb. 12th.

W. MAINWARING, G. B. MAINWARING, and T. CHATTERIS v. NEWMAN.

Assumpsit by A. B. and C. against D. as one of the indorsers of a promissory note drawn by E. in favour of C. D. and (himself) E. then in partnership and by them indorsed to A. B. and C.; plea in bar that C. one of the Plaintiffs is liable as an indorser, together with D. and held good on special demurrer.

THE declaration in this case stated "that one James Brander on 8c. at 8c. made his certain note in writing commonly called a promissory note his own proper hand-writing being thereunto subscribed bearing date the same day and year aforesaid and then and there delivered the said note so subscribed to the said William Newman and one James Brander and one Thomas Chatteris carrying on trade together in partnership under the name style and firm of Newman Brander and Chatteris by which said note the said James Brander two months after date promised to pay to the order of the said William Newman James Brander and Thomas Chatteris by the names and description of Messrs. Newman Brander and Chatteris 2800*l.* value in account And the said William Newman James Brander and Thomas Chatteris to whose order the payment of the said sum of money in the said note contained was thereby appointed to be made afterwards and before the pay-

ment of the said sum of money in the said note contained or any part thereof and before the time thereby appointed for such payment to wit on &c. at &c. indorsed the said note the handwriting of one of them on their joint and partnership account and in their joint and partnership name style and firm of *Newman Brander and Chatteris* being thereunto subscribed and by that indorsement appointed the contents of the said note to be paid to the said *William Mainwaring George Boulton Mainwaring and Thomas Chatteris*, and then and there delivered the said note so indorsed to the said *William Mainwaring George Boulton Mainwaring and Thomas Chatteris* of which said indorsement so made upon the said note as aforesaid the said *James Brander* afterwards to wit on &c. at &c. had notice And the said *William Mainwaring George Boulton Mainwaring and Thomas Chatteris* aver that afterwards and when the said note became due and payable (to wit) on &c. at &c. they the said *William Mainwaring George Boulton Mainwaring and Thomas Chatteris* shewed and presented the said note so indorsed as aforesaid to the said *James Brander* for his payment of the said sum of money therein contained and then and there required him to pay the same But the said *James Brander* did not then or at any time whatsoever pay the said sum of money in the said note mentioned or any part thereof but then and there wholly refused so to do of all which premises the said *William Newman James Brander and Thomas Chatteris* afterwards to wit on &c. at &c. had notice By reason of all which premises and by force of the statute in that case made and provided the said *William Newman* became liable to pay the said *William Mainwaring George Boulton Mainwaring and Thomas Chatteris* the said sum of money in the said note mentioned and being so liable the said *William Newman* in consideration thereof afterwards to wit on &c. at &c. undertook and to the said *William Mainwaring George Boulton Mainwaring and Thomas Chatteris* then and there faithfully promised to pay to them the said sum of money in the said note mentioned when he the said *William Newman* should be thereunto afterwards requested." There were also counts in *indebitatus assumpsit* for money had and received, money paid, and money lent, and on an account stated, in each of which *William Newman* was stated to be indebted to *William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris*, and in consideration thereof, to have promised to pay to them 7000*l.* These counts were followed by the common breach that *William Newman* had not paid to the said

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William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris, or either of them, &c.

Pleas. 1st, *Non assumpsit*. 2dly, "That the said *Thomas Chatteris*, one of the said payees and indorsers of the said promissory note in the first count of the said declaration mentioned, is one and the same person with the said *Thomas Chatteris* one of the said Plaintiffs, and not other or different, and that the said several promises and undertakings in the said declaration mentioned were, and each of them was, made by the said *William Newman* together with the said *Thomas Chatteris*, jointly, and not by him the said *William Newman* separately from and without the said *Thomas Chatteris*, to wit, at, &c. And this, &c. Wherefore &c."

To this second plea there was a special demurrer assigning for causes "that the said *William Newman* hath not in or by that plea traversed or denied the making by him the said *William Newman* of the said promises or undertakings in the said declaration mentioned, nor hath he thereby confessed and sufficiently avoided the same. And also for that the said *William Newman* hath thereby attempted to plead in bar of the action of the said *William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris*, matters which ought to have been pleaded, if at all, in abatement of the original writ of the said *William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris*, and not in bar of the said action. And also for that the same plea doth not mention but wholly omits the said *James Brander* the other payee, and indorser in the first count of the said declaration mentioned of the said promissory note therein mentioned. And also for that the matters contained in the same plea are wholly immaterial and contain no answers to the said declaration of the said *William Mainwaring, George Boulton Mainwaring, and Thomas Chatteris*, and that the same is in other respects evasive, argumentative, and informal."

Lens Serjt. in support of the demurrer. The subject of the Defendant's plea is, not that the same person is Plaintiff and Defendant, but that one of the Plaintiffs being also one of the payees might have been made a defendant. Of this the Defendant might have taken advantage by plea in abatement, but having omitted to do so, the Court will not now take notice that this matter, which is the proper subject of a plea in abatement, appears on the record. *Deering v. Moor*, Cro. Eliz. 554. *Cabell v. Vaughan*, 1 Saund. 291. *Addison v. Overend*, 6 Term Rep. 766. The course which the Defendant should have pursued is this; he should

first have pleaded in abatement, that *T. Chatteris*, one of the payees, was not joined as a Defendant, and then upon his being made a Co-defendant, he should have pleaded in bar that the same person was made a Plaintiff and a Defendant. If it be insisted that this could not have been pleaded in abatement because a better writ could not have been given, it may be observed, that it is not an invariable rule that a better writ must be given in such a case. *Symonds v. Parmenter*, 2 Str. 1269. (a) In this case, however, a better writ might have been given, since by such a writ as has been suggested all the payees would have been made Defendants in the suit. Though perhaps it may appear on the face of the first count that the same person, who is one of the Plaintiffs, ought to have been made a Defendant, yet this observation does not apply to the three last counts, where the contract is alleged to have been made with *Newman* only. It is true, that the plea, which is pleaded to the whole declaration, avers that the several promises were made by *Newman* coupled with others; but that is only the subject of a plea in abatement to the three last counts, upon the face of which it does not appear that *T. Chatteris* may be both Plaintiff and Defendant: the plea, therefore, being pleaded to the whole declaration, is bad. Besides, the promises being jointly made by *Newman*, one *James Brander*, and *Thomas Chatteris*, the Defendant's plea, which states them to have been made by *Newman* and *Chatteris* only, is on that account also incorrect.

Heywood Serjt. contra. As it was impossible for the Defendant in this case to give a better writ to the Plaintiff, he could not plead in abatement; and as it was necessary to introduce upon the record the fact of the promises being made jointly by the Defendant and one of the Plaintiffs, the Defendant was compelled to adopt the special plea in question. Had this matter appeared distinctly on the face of the declaration, the Defendant might have demurred, since the objection destroys the Plaintiff's right of action. No distinction can now be taken on the form of the different counts, because the plea has averred that *all* the promises were made by *Newman* and *T. Chatteris* jointly. With respect to *Addison v. Overend*, it might be sufficient to observe that it was a case of *tort*, and therefore not applicable to the case now before the Court. It appears to me, however, that the decision in *Addison v. Overend* proceeded on a mistake. The objection appeared on the face of the declaration; now, if that which is the subject of a plea in

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(a) Vide etiam *Fin. Ab.* tit. *Abatement*, (E. b.) *Co m. Dig.* tit. *Abatement*, (I. 2.)

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abatement appear on the face of the declaration, why call for a plea in abatement? the only object of which is to introduce on the record that which will give the Plaintiff a better writ. The cases prove, that where a Plaintiff by his own shewing cannot maintain the action on his writ, the Court will abate the writ *ex officio* (a). The argument of the Court in *Addison v. Overend* was, that if the substance of a plea in abatement appear on a special verdict, it shall not abate the writ, and therefore that it should not, where it appears on the declaration; but it may be observed, that if such a fact appear on a special verdict, it appears there improperly, since it ought never to have been received in evidence. The expression in *Deering v. Moor* is, "the finding it by the jury is not material (b)." The substance of the plea is not that the Plaintiffs have sued *one* on a joint contract, but that one of the Plaintiffs ought also to have been made a Co-defendant; and the objection is, that the promise on which the Plaintiffs have sued is such a promise as cannot be enforced against the Defendant. This very point was decided in *Moffatt and Others v. Van Millingen, E. 27 G. 3. B. R.* (c) With respect to the last objection to the plea, that one *James Brander* was also liable, it may be answered, that the name of *Newman* alone appears in the three last counts, and that the only other name introduced by the plea is that of *Chatteris*; and although the name of *J. Brander* appear

(a) Vide 1 Roll. 176. Hob. 199. 280. and 281. and the cases collected in *Vin. Ab. tit. Abatement*, (K. b.)

(b) Vid. etiam *Harman v. Whichlow*, Lach. 152. where this distinction was taken by Sir W. Jones, and agreed by the Court. So in *Whelpdale's case*, 5 Co. 119. *Stead v. Moon*, Cro. Jac. 152. and *Holdwich et Ux. v. Chase*, All. 42. the Court refused to abate the writ where matter pleadable in abatement appeared on special verdict. But in *Horsmer v. Moor*, cited 5 Bur. 2614. where such matter appeared on the declaration, and in *the King v. Young*, cited 6 Term Rep. 769. where it appeared on *scire facias* the Court did abate the writ though it was not pleaded.

(c) *Moffatt and Others v. Van Millingen, East*, 27 G. 3. B. R. *Indebitatus assumpsit* by the Plaintiffs as executors. The plea averred that the promises if any were made by the Defendants, together with two others, and the Plaintiff *Moffatt*, and concluded with praying that the declaration might be quashed. To this there was a special demurrer, assigning for cause that the Defendant had concluded by praying that the declaration might be quashed, and had pleaded in abatement of the declaration, whereas he

should have pleaded in abatement of the bill, &c. On this demurrer the Plaintiffs had judgment of *respondeat oster*; whereupon the Defendants now pleaded in bar, "that the several promises and undertakings in the said declaration mentioned, if any such were or was made, were and each and every of them was made by them, the Defendants, together with the said *William Moffatt*, one of the Plaintiffs in this cause, jointly, and not by them the said Defendants separately from and without the said *William Moffatt*, to wit, at, &c. And this, &c. Wherefore, &c." To this plea the Plaintiffs demurred.

Wood for the Plaintiffs contended that this matter could only be pleaded in abatement; that *Moffatt* was in *auter droit* a executor and trustee; and that the debt was not extinguished in equity by his being executor to the person entitled.

BULLER J. (without hearing *Gibbs* for the Defendant.) The promise was made jointly with one of the Plaintiffs. How can he sue himself in a Court of Law? It is impossible to say that a man can sue himself.

Judgment for the Defendants

on the first count as one of the payees *non constat* that he is not dead (a).

Cur. adv. vult.

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Lord ELDON Ch. J. on a subsequent day said; The present opinion of the Court is that the Defendant must have judgment. Indeed it appears to me that the subject of the present plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to shew that the Plaintiff can have no action at all. Certainly the case is of great importance, and it has not been without some hesitation that I have been able to come to a decision upon it. The facts of the case are these; a man of the name of *Brander* makes a promissory note to three persons, namely, to *Newman*, to himself, *Brander*, and to *Thomas Chatteris*. This note is indorsed to *William Mainwaring*, *George Boulton Mainwaring*, and *Thomas Chatteris*, who are clearly the persons appearing on this record as Plaintiffs. The effect of a judgment for the Defendant will be, that if a man make a note to himself and others carrying on business under a particular firm, and that partnership be dissolved, the promissory note can neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering therefore the quantity of circulating paper in this country standing under the same circumstances with the note in question, the consequences of such a decision may be highly injurious. However the case of *Moffatt v. Van Millingen* cited by my brother *Heywood* is unanswerable.

The case stood over till this day, when the Court observed, that if any inconvenience should result from a judgment in favour of the Defendant it was for the Legislature to interfere, but that the Defendant was entitled to judgment.

Judgment for the Defendant.

(a) See as to this point *Cabell v. Vaughan*, and the notes subjoined thereto in *Williams's Saunders*, vol. 1. p. 291.—It may also be observed, that as *James Brander* was not one of the Plaintiffs, his liability to be made a co-defendant was only the subject of a plea in abatement, (see *Williams's Saunders ubi supra*,) and consequently to have introduced his name into the plea in bar, would have been incorrect.

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Feb. 12th.

BAILEY v. HANTLER.

Defendant being arrested on a writ returnable the last return of *Mich.* Term, put in bail on the last day of that term, who justified on the first day of *Hil.* Term; a declaration was delivered on the third day of *Hil.* Term, and in the same Term judgment was signed for want of a plea. Held regular, the Defendant not being entitled to an imparlance.

THE Defendant being arrested in *Michaelmas* Term on a writ returnable the last return of that term, put in bail on the last day of that term, who justified on the first day of *Hilary* Term; a declaration was delivered on the 25th of *January*, indorsed to plead in four days, otherwise judgment, and in the evening of that day a rule to plead was given; on the 28th of *January* a plea was demanded, and on the 31st of the same month judgment was signed for want of a plea.

On a former day *Shepherd* Serjt. obtained a rule *Nisi* for setting aside this judgment and all subsequent proceedings thereon, with costs, on the ground of the Defendant's being entitled to an imparlance, and therefore not obliged to plead, the declaration not having been delivered until after the *Essoign-day* of *Hilary* Term. On this day he contended, that the Plaintiff should have delivered his declaration *de bene esse* before the *Essoign-day*, in order to deprive the Defendant of an imparlance over this term, and cited a case to this effect from 1 *Crompt. Pr.* 126. *Ed.* 3. 26th *January* 1764.

Bayley Serjt. *contra* insisted that the Plaintiff was never obliged to declare *de bene esse*, and that he could not declare in chief until the bail were perfected, which was not till after the *Essoign-day*.

The Court after referring to the officers said, that although a Plaintiff be entitled to declare *de bene esse* if he please before the Defendant is in court, yet that he is not compellable to do so, and that the judgment was therefore regular.

Rule discharged (a).

(a) *Vid.* 1 *Sellon Pract.* 268. *ed.* 2. *Rook v. The Earl of Leicester*, 2 *Term Rep.* 16. and *Rolleston v. Scott*, 5 *Term Rep.* 372.

Mr. Justice BULLER was absent during the whole of this Term from indisposition.

In this Term *William Draper Best* of the *Middle Temple* Esquire, was called to the honourable degree of Serjeant at Law, and gave rings with this motto, "*Libertas in legibus.*"

C A S E S

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ARGUED AND DETERMINED

IN, THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

AND

In the HOUSE OF LORDS;

IN

Easter Term,

In the Fortieth Year of the Reign of GEORGE III.

The KING v. SMITH.

THE Defendant was indicted at the Summer assizes for *Kent* 1799, on the 15 *Geo. 2. c. 28. s. 3.*

In an indictment on the 15 *G. 2. c. 28. s. 3.* it is not necessary to aver that the Defendant is a common utterer of false money.

The indictment stated, that the defendant on, &c. "with force and arms at &c. one piece of false and counterfeit money made and counterfeited to the likeness and similitude of a piece of good lawful and current money and silver coin of this realm called an half-crown, as and for a piece of good lawful and current money and silver coin of this realm called an half-crown then and there unlawfully unjustly and deceitfully did utter to one J. F., he the said Defendant at the time when he so uttered the said piece of false and counterfeit money, then and there well knowing the same to be false and counterfeit, and also that he, the said Defendant at the time when he so uttered the said piece of false and counterfeit money as aforesaid to wit on &c at &c had about

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him the said Defendant in the custody and possession of him the said Defendant one other piece of false and counterfeit money made and counterfeited to the likeness and similitude of a piece of good lawful and current money and silver coin of this realm called an half-crown he the said Defendant then and there well knowing the said last-mentioned piece of false and counterfeit money to be false and counterfeit. In contempt &c against the form of the statute" &c (a)

The Defendant was tried and found guilty before *Buller J.* who reserved the following question for the opinion of the Judges, viz. Whether the indictment should have concluded with an averment that the Defendant was a common utterer of false money?

The case was argued before the Judges (*absente Buller J.*) in the Exchequer Chamber.

Gurney for the prisoner contended, that when the law gives any particular name to an offence, that offence ought not to be described in an indictment by any circumlocution; as in murder where all the circumstances which constitute the crime, if stated in the indictment, will not dispense with the allegation that the party is guilty of murder; that the same rule obtained with respect to perjury, and that as the statute had in this instance declared that a person under certain circumstances should be deemed a common utterer of false money, the indictment ought to have charged him with being so, in the very words of the statute.

Fielding on the part of the prosecution argued, that the conclusion of law necessarily resulted from the facts set forth; that the Legislature after stating the circumstances which constitute the crime, had declared, that a person offending against this provision of the act, should be "deemed, and taken to be a common utterer," which words are equivalent to the expression "adjudged a common utterer;" that this case therefore was not like those where a

(a) Which enacts, "that if any person whatsoever shall utter or tender in payment any false or counterfeit money knowing the same to be false or counterfeit to any person or persons and shall either the same day or within the space of ten days then next utter or tender in payment any more or other false or counterfeit money knowing the same to be false or counterfeit to the same person or persons or to any other person or persons or shall at the time of such uttering or ten-

dering have about him or her in his or her custody one or more piece or pieces of counterfeit money besides what was so uttered or tendered then such person so uttering or tendering the same shall be deemed and taken to be a common utterer of false money and being thereof convicted shall suffer a year's imprisonment, and shall find sureties for his or her good behaviour for two years more to be computed from the end of the said year."

technical

technical name having been given by the Legislature to the offence itself, that name must be employed in describing such offence.

At the ensuing Spring assizes for *Kent*, *Heath J.* delivered the opinion of the Judges that the indictment was well enough.

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GIBSON v. CHATERS.

May 5th.

THIS was an action on the case for maliciously and without any just or probable cause arresting the Plaintiff and holding him to bail.

At the trial before Lord *Eldon Ch. J.* at the Guildhall sittings after last *Hilary* term, it appeared that the Plaintiff and the Defendant were both resident at *North Shields* in *Northumberland*, the former being the master, and the latter the owner of a ship; that some matters in difference between them having been submitted to arbitration, the Plaintiff was awarded to pay the sum of 19*l.* 14*s.* on the 31st of *November* 1797, but in consequence of his being absent from home at that time, and not returning till *March* 1799 did not pay the sum awarded; that in *December* 1798 the Defendant being in *London* made an affidavit of debt to hold the Plaintiff to bail, and that a writ issued thereupon; that on the Plaintiff's return to *North Shields* in *March* 1799, he hearing of the Defendant's intention to arrest him, paid the debt to the Defendant's agent at *North Shields*, and took a receipt for the amount; that on the 4th of *May* following, the plaintiff having arrived in the river *Thames* from *North Shields*, was arrested and holden to bail by the Defendant's attorney, on an *alias* writ taken out at that time, but grounded on the affidavit made by the Defendant in *December* 1798. His Lordship being of opinion that it was necessary to prove express malice, and that no evidence of malice had been given, nonsuited the Plaintiff.

In an action for maliciously holding to bail, it is not sufficient to prove that the writ was sued out after payment of the debt, if the circumstances afford no inference of malice; but in such case evidence of actual malice must be given.

Best Serjt. now moved for a rule nisi to set aside this nonsuit, and have a new trial; contending that the case was distinguishable from that of *Scheibel v. Fairbairn*, ante, vol. i. p. 388.; the writ on which the Plaintiff in that case was arrested having been sued out previous to the time when the debt was paid, whereas the writ in the present instance was actually taken out after the debt had been discharged and a receipt given; that the ground of complaint in *Scheibel v. Fairbairn* was a mere nonfeasance in the Defendant who had omitted to countermand a writ previously sued out, and

was

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was so treated by the Court, but that this was a malfeasance and came expressly within the rule laid down in *Waterer v. Freeman*, *Hob.* 267. that a man is liable to an action if he sue against his release, or after the debt duly paid. He observed, that the rule with respect to proving malice in actions for malicious prosecutions, did not hold in the case of actions for holding to bail in a mere civil suit, since the rule in the former instance proceeded on the danger of discouraging prosecutions for public offences.

But *the Court* were of opinion that the facts of this case precluded any inference of malice, and that the Plaintiff therefore to entitle himself to recover ought to have given evidence of actual malice.

Best took nothing by his motion.

May 8th.

SHIRLEY v. SANKEY and Others, Executors of
 COLLINGWOOD.

An action
 will not lie
 on a promissory
 note
 given in
 payment of
 a wager on
 the amount
 of the hop-
 duties.

THIS was an action on a promissory note for 157*l.* 10*s.* dated the 12th *July* 1793.

The cause was tried before *Hotham* B. at the last Spring assizes for *Kent*, when it was proved that in *August* 1792 the Plaintiff and the Defendants' testator laid a wager on the amount of the hop-duties for that year; that the event proving favourable to the Plaintiff, the Defendants' testator gave him the promissory note in question for the amount of the wager.

At the trial it was objected, that since it was established by the case of *Atherfold v. Beard*, 2 *Term Rep.* 610. that wagers on the amount of the hop-duties, or of any other branch of the public revenue, were illegal, and no action could be maintained upon them, therefore the present Plaintiff could not maintain an action on this note, the consideration of which was a wager upon the amount of the hop-duties.

The learned judge being of that opinion nonsuited the Plaintiff.

Baily Serjt. on a former day moved to set aside that nonsuit, and contended, that this case was distinguishable from *Atherfold v. Beard*; first because the note was not given until the growth of the hops was complete, consequently it was not possible for either party to affect the amount of the duties with a view to his own interest; secondly, that as the question respecting the amount

of the duties was admitted by the note to be in favour of the Plaintiff, no discussion of that question need now take place, and therefore no inconvenience could arise to the public. He urged that this note stood on a different footing from notes given on smuggling or other illegal transactions of that kind, since the wager which was the consideration of it, was neither illegal or immoral in itself, though the Court had refused to enforce it on account of public inconvenience.

The Court said, they would look into the case of *Atherfold v. Beard* before they granted a rule *nisi*, and on this day

LORD ELDON Ch. J. said, We can discover no difference between this case and that of *Atherfold v. Beard*. There also the discussion respecting the amount of the hop-duties was shut out; for the Plaintiff gave in evidence the admission of the Defendant that he had lost his wager, and upon that evidence obtained a verdict (a). What difference then is there between the two cases?

Bayley Serjt. took nothing his motion.

(a) In that case, which came on by motion in arrest of judgment, *Grose* J. observed, that the objection to the wager appeared upon the face of the record; where the Defendant's admission as to the amount of the duties could not appear. And in *Good v. Elliott*, 3 Term Rep. 700. *Buller* J. remarked that the case of *Atherfold v. Beard* established, that if an action lead to improper inquiries, it may be stopped in li-

mine; and that the case could not have been decided on any other ground, because the confession of the Defendant excluded any actual discussion concerning the public revenue. The principal case however being an action on a promissory note, nothing appeared upon record which could lead to improper inquiries, nor could any evidence upon the amount of the duties have been received.

M. TATTERSALL Administratrix of W. TATTERSALL May 12th.
v. GROOTE.

COVENANT. The declaration stated, that by an indenture dated the 2d of January 1797, between *G. W. Groote*, the Defendant, and *W. Tattersall* the Plaintiff's intestate, reciting that in consideration of 420*l.* paid to *G. W. Groote* by *W. Tattersall*, *G. W. Groote* agreed to accept *W. Tattersall* as a partner in his business of an apothecary, it was witnessed that in consideration of the premises

If *A.* and *B.* in consideration of a sum of money paid by one to the other enter into partnership and covenant in case of a dis-

solution of the partnership to submit all matters relating thereto, to arbitration, the arbitrators are not thereby authorized to determine whether any part of the sum of money which was the consideration of the partnership should be refunded.

Semb. that no action can be maintained for refusing to nominate an arbitrator in pursuance of a covenant to refer matters to arbitration.

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they became partners in the business aforesaid, subject to the provisions and agreements in the indenture contained; that it was "covenanted by and between the said *G. W. Groote* and *W. Tatterfall*, and *G. W. Groote* and *W. Tatterfall* deceased and each of them for himself his executors and administrators did covenant promise and agree to and with the other of them his executors and administrators that if at any time during that co-partnership or at or after any determination thereof any variance dispute doubt or question should arise happen or be moved between the said parties or either of them their executors or administrators in for about or touching the said joint concern, or copartnership or any covenant agreement clause matter or thing therein contained or in the construction thereof, or in anywise relating thereto, then every such variance dispute doubt or question should be referred to and be resolved and determined by two indifferent persons to be elected and chosen by the said partners, that is to say, one by each of them within twenty days next after such variance dispute doubt or question should arise happen or be moved," with power to the arbitrators to elect an umpire in case of dispute; and that each of them covenanted to abide by the determination of the arbitrators "without any further dispute or trouble whatsoever." The declaration then averred, that on the 11th of *December* 1798, the co-partnership was dissolved by consent, and that after such dissolution *W. Tatterfall* conceiving himself entitled to a return of the 420*l.* the consideration of the co-partnership, all disputes touching the same were referred to the award of two indifferent persons elected for the purpose by the said *W. Tatterfall* and *G. W. Groote*, but that *W. Tatterfall* died before any award was made; that since his death the Plaintiff *Margaret Tatterfall* conceiving herself to be entitled to the said 420*l.* as administratrix, in order to put an end to the dispute, did within 20 days proceed to name to the said *G. W. Groote* an indifferent person as an arbitrator on her part, and requested the said *G. W. Groote* to name one on his part. The breach was, that *G. W. Groote* refused to nominate an arbitrator, whereby the Plaintiff was prevented from recovering by means of the said arbitration the said 420*l.* paid as the consideration of the said co-partnership, and which was dissolved without any benefit accruing thereby, either to the said *W. Tatterfall* in his life-time, or to the Plaintiff as his administratrix since his death.

The Defendant prayed *oyer* of the indenture, by which it appeared, that *G. W. Groote* apothecary to Her Royal Highness the Dutchess

Dutchess of York, and *W. Tatterfall* man-midwife and apothecary, entered into partnership for so long a time as they should mutually agree, the latter paying to the former 420*l.*; that they entered into the several covenants usually contained in articles of partnership; that *G. W. Groote* then covenanted with *W. Tatterfall* not to interfere with or endeavour to turn to his own advantage that part of the practice established during the co-partnership which respected midwifery, but that *W. Tatterfall*, his executors, administrators and assigns, should be at liberty after the dissolution of the partnership to carry on that part of the business or dispose of it to their own advantage; then followed the covenant as set out in the declaration, for referring all matters in dispute to arbitrators, and abiding by their award.

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The defendant then demurred generally to the declaration; and the Plaintiff joined in demurrer.

Lens Serjt. in support of the demurrer. 1st, This action is novel in its kind and cannot be maintained. The covenant on which it is founded is not so far binding as to oust the jurisdiction of the courts of common law; for it cannot be pleaded in bar to an action in those courts. *Thompson v. Charnock*, 8 *Term Rep.* 139. Now if it were so far binding as to subject a party to damages for not submitting to arbitration, the same consequence would ensue as if the party were allowed to plead it in bar. It is true that in *Halfhide v. Fenning*, 2 *Brown Chan. Cas.* 336. an agreement to refer all matters in difference was allowed to be pleaded to a bill filed for a partnership account; but in that case it was also agreed that they would not sue either at law or in equity: and even this determination is much shaken by the subsequent case of *Mitchell v. Harris*, 2 *Vez. jun.* 129. Such an action as the present, if it could be supported, would be altogether fruitless; since it would be impossible for the jury to ascertain the damage sustained by refusing to submit to an arbitration, when it cannot appear what the result of such an arbitration would be. 2^{dly}, This case is not within the covenant, which directs that all matters relating to the co-partnership shall be referred to arbitration, whereas the subject of the present dispute is the original consideration of entering into the co-partnership. 3^{dly}, By the terms of the covenant one arbitrator is to be named by each of the partners; but the Plaintiff who is executrix to one of the partners has no authority to nominate, and consequently cannot sue the Defendant for omitting to nominate on his part.

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Shepherd Serjt. contra. 1st, It is clear that an agreement to refer matters in dispute to arbitration is not illegal. Such agreements are recognised and enforced by the 9 & 10 of *Will. 3. c. 15.* But where a man covenants to do any thing which by law he may do, he is liable to an action for non-performance of his covenant. Many things may be the subject of an action of covenant though the result of the decision would require a further investigation. Thus if a man covenant to account, an action may be maintained on his refusal to do so; yet a subsequent action would be necessary to recover the balance of the account. Whatever difficulty may be found in ascertaining the damage, the only question now is, Whether the action be not maintainable? 2d, Nothing can be larger than the expressions of this covenant. The terms upon which the partnership should be dissolved is clearly within the meaning of them. It is possible that the propriety of restoring the 420*l.* or a proportionable part of it, might be the foundation of a suit in equity; as if some fraud had been practised in the formation of the partnership. If therefore this question could be the foundation of a suit in equity, it was clearly a proper subject for arbitration. 3dly, The Court will so construe the covenant as to give effect to the intention of the parties. The words of the covenant respect any difference which shall be moved between the said parties or either of them, their executors or administrators; it would therefore be absurd to confine the agreement to nominate arbitrators to the partners themselves.

Lord ELDON, Ch. J. (after stating the case). These articles purport to be an agreement between two gentlemen, conversant in the different branches of the medical profession; and one of them has thereby decided for himself, that it was worth his while to give 420*l.* to the other on the establishment of a joint concern. It was competent to him to decide on the prudence of such a measure, taking into consideration the probability of the connection being of long continuance or not. It is very evident from the covenant which provides that the practice of midwifery shall belong wholly to Mr. *Tatterfall*, after the dissolution of the partnership, that he might derive a sufficient inducement for entering into it from the hope of being soon able to establish his character in that branch, and then to dissolve the partnership and set up for himself. He declined entering into articles for a definite period of time; we may therefore lay out of the case the whole doctrine

of equity respecting agreements between masters and apprentices, where part of the consideration has been restored to the latter on the ground of its having been paid with a view to some continued benefit which has been interrupted by some unexpected event. The case has been argued on these grounds. I shall first consider the second, and on that point I am clearly of opinion that the case is not within the articles. See how it stands. In consideration of 420*l.* to be paid by Mr. *Tattersall*, the parties agree to enter into the articles. The covenant to refer matters to arbitration in point of consideration, is sustained by the payment of 420*l.* and yet by virtue of that very covenant it is now made a matter of dispute, whether the 420*l.* ought to have been paid or not. Courts of equity will interfere in cases where fraud has been practised, and order the consideration to be returned; but then they treat the articles as a nullity in consequence of the fraud; whereas here the parties apply to a court of law to enforce a covenant in the articles, because they are binding. Large as the words are, I do not think that they authorise a demand of an arbitration on the point, whether the consideration of the articles should have been paid or not. With respect to the third point, I do not feel that we are bound to struggle to make sense of the terms which the parties have used. It can hardly be doubted that the parties meant to extend the power of nomination to their executors and administrators; but the words are "partners and each of them." Now there is no sufficient reason in this case for extending those words beyond their obvious sense. On these two last grounds therefore I am clearly of opinion that judgment must be given for the defendant.

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With respect to the first point, if it were necessary to give an opinion I should wish to take time to consider of it. This is quite clear, that there is no instance of such an action as the present having ever been brought in a court of law, and it is equally clear that though courts of equity will decree the specific performance of reasonable covenants where substantial damages cannot be obtained in a court of law, yet no man, I apprehend, ever heard of a suit in Equity to compel the specific performance of a covenant to refer disputes to arbitration. In *Wellington v. Mackintosh*, 2 *Atk.* 569. Lord *Hardwicke* overruled a plea of covenant to refer matters in difference which was pleaded to a bill for a discovery. Lord *Kenyon*, indeed, in *Halfhide v. Fenning*, supported such a plea;

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but then the words there were, "before they brought any suit." I think I do not misconstrue the case of *Mitchell v. Harris*, by stating that the opinion of Lord *Loughborough* did not agree with the doctrine laid down in *Halfbide v. Fenning*. In the discussion of *Mitchell v. Harris*, the counsel were asked by the Lord Chancellor if an action like the present had ever been known in a court of law, and it was admitted that no instance was to be found. It would be difficult to direct a jury upon what rule to proceed in assessing damages in such an action; for *non constat* that the Plaintiff would have succeeded in the arbitration. The covenant therefore seems nugatory, or if not so, yet it cannot be enforced as tending to exclude the jurisdiction of the courts.

HEATH J. I am of the same opinion. If it were necessary to decide the case upon the first ground, I should wish to consider it more fully. It appears to me, however, that the covenant is tantamount to a covenant to forbear suing. Indeed it does not appear upon these pleadings that the Plaintiff is entitled to the 420 l. whereas he was bound to make out a title to recover it. Thus in an action for not accounting, the plaintiff must shew that the defendant has received a certain sum of money; otherwise no legal difference appears between them. In the same manner an action can never lie for not going before an arbitrator unless it appear that there is a fair subject of arbitration. By the words of the covenant in the present case, the power of nominating arbitrators is confined to the partners themselves.

ROOKE J. On the first objection the inclination of my opinion is, that the covenant is futile; but it is not necessary to decide that point. On the two last grounds I am of opinion that judgment should be given for the Defendant.

Judgment for the Defendant.

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MURPHY v. CADELL.

May 13th.

THIS was an application to stay proceedings in an action in this Court, on the ground of the Plaintiff having filed a bill in Chancery against the Defendant for a discovery and an account, respecting the very matters for which he was pursuing his remedy here.

The Court will not stay proceedings in an action, on the ground of a bill depending in chancery for the same cause.

Cockell Serjt. shewed cause against the rule, and cited *Jones v. Clay*, ante, vol. 1. p. 191. where the Court refused to compel a party to elect whether he would proceed by indictment or action for the same cause.

Shepherd Serjt. argued in support of the rule.

But *the Court* were of opinion they could not interfere, observing, that possibly the Defendant might be in contempt in Chancery for having put in an insufficient answer.

Rule discharged without costs.

PAYNE v. WHALEY.

May 13th.

BEST Serjt. having obtained a rule *nisi* for setting aside a *fieri facias* in this case and all proceedings thereon, as being subsequent to the allowance of a writ error;

Allowance of a writ of error may be served before the plaintiff is entitled to sign final judgment.

Bayley Serjt. shewed cause and contended that the allowance of the writ of error was irregular, inasmuch as it served before the Plaintiff was entitled to sign final judgment.

But *the Court* held the allowance regular (a).

Rule absolute.

(a) Vid. *Gravall v. Stimpson*, vol. 1. p. 479. for what is said on this subject by *Erre* Ch. J.

THOMPSON v. JORDAN.

May 14th

THIS was a rule obtained by *Lens* Serjt. calling on the Plaintiff to shew cause why the interlocutory judgment, and all subsequent proceedings thereon, should not be set aside for irregularity with costs.

If the writ by which a replevin is removed be returnable on the first return of the term, and the Plaintiff do not declare within four

The Defendant having distrained upon the Plaintiff for rent, the latter replevied the goods, and on the 16th of *December* 1799

days before the end of that term the Defendant is entitled to an imparlance; though he has not appeared within the term.

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removed the action of replevin into this Court by a writ of *accedas ad curiam* (a), returnable on the first return of *Hilary* term (*Jan.* 20), 1800. Previous to the return of this writ it was shewn to the Defendant's attorney who undertook to appear: but on the 22d of *January* no appearance having been entered, the Plaintiff ruled the Defendant to appear in four days, and on the 4th of *February* the Plaintiff's attorney gave notice to the Defendant's attorney that the writ of *accedas ad curiam* had been returned and filed, and demanded that an appearance should be entered, adding, that unless an appearance were entered a *distingas* would issue. On the 8th of *February* no appearance having been entered, the Plaintiff sued out a *distingas* returnable on the last return of *Hilary* term (*Feb.* 12). On the 14th of *February*, being two days after the expiration of *Hilary* term, the Defendant entered an appearance, and on the same day a declaration was delivered, and a rule to avow served on the Defendant; which rule not having been complied with, interlocutory judgment was signed. The objection to the regularity of the judgment was, that as the writ of *accedas ad curiam* was returnable on the first return of *Hilary* term, and the declaration was not delivered until two days after the end of that term, the Defendant was intitled to an imparlance.

Best Serjt. now shewed cause, and admitted, that as the Plaintiff instead of enforcing the undertaking of the Plaintiff's attorney had proceeded by *distingas*, the case must be considered as if no such undertaking had been made; but he contended, that as the Plaintiff had been prevented from declaring within four days before the end of *Hilary* term by the Defendant neglecting to appear, the latter was not entitled to an imparlance. He cited *Rooke v. The Earl of Leicester*, 2 *T. R.* 16. & 1 *Sellon Prac.* 268.

(a) This writ is only a species of *recordari facias loquelam*, and is employed when "a replevy is sued by plaint in the court of any other lord than in the county court before the sheriff." By this writ the sheriff is directed to go to the court of the lord, and there record the plaint; whereas the common *recordari facias loquelam* directs him to record that plaint which is in his own court. *F. N. B.* 70. *B.* Where the replevin is by writ out of Chancery, either in the county court or in the court of a lord of a Hundred, &c. it must be removed by *Pone*. *F. N. B.* 69, *M.* 70. *A.* Et sciendum est quod Recordare vel Pone pro defendente semper debet

fieri cum causâ, siue loquela sit in curia regis siue alterius. Et si loquela sit in curia Wapentachii Hundredi, &c. alterius magnatis, semper inferenda est causâ, siue fuerit pro petente siue pro defendente. Si autem loquela fuerit in aliquâ curiâ regis non est pro petente cum causâ, sed pro defendente sic. *Reg. Orig.* 85. *b.* Vide etiam, 2 *Inst.* 339. There is also an *accedas ad curiam* where false judgment has been given in a Hundred court, court baron, &c. *F. N. B.* 18. *A. B.* And if justice be delayed in the little writ of right, the demandant shall have a writ *quod vicecomes accedat in propria persona sua ad curiam*, &c. *ad videndum quod plena justitia exhibeatur*, &c. *Reg. Orig.* 9. *b.*

But *the Court* (after consulting the officers) were of opinion, that the exception (a) contended for did not apply to the action of replevin; and that the Defendant therefore was entitled to an imparlance.

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Rule absolute without Costs.

(a) Vid. *Bayley v. Hunter*, *ante*, p. 126. and the cases there referred to.

(In the EXCHEQUER CHAMBER.)

LORD PETRE v. LORD AUCKLAND and LORD GOWER,
Postmaster-General; in Error.

May 14th.

THIS was an action of *indebitatus assumpsit* for money had and received; and was tried before Lord *Kenyon* at the *Guildhall* sittings after last *Michaelmas* term, when his Lordship having directed the jury to find a verdict for the Defendants, a bill of exceptions was tendered. A verdict having been found for the Defendants, and judgment given in the *King's Bench* accordingly, a writ of error was brought, and the common errors assigned. From the bill of exceptions, when sealed and annexed to the record, the case appeared to be in substance as follows:—That Lord *Petre* before and at the time of the receipt of the sum of sevenpence hereinafter mentioned, was a peer of *Great Britain*, by hereditary descent from his ancestor *John Petre*, who was created by letters patent of the 21st July 1603, Baron *Petre* of *Writtle* in the county of *Essex*, to hold to him and his heirs male; that the ancestors of Lord *Petre* enjoying the said honour and dignity, have always been summoned to parliament in right of the said dignity; and that Lord *Petre* long before the demand and receipt of the said sum of sevenpence hereinafter mentioned, viz. on the 30th of May 1796, (he being then of the age of 21 years and upwards,) was duly summoned to the present parliament in right of his said dignity; that Lord *Auckland* and Lord *Gower* before and at the time of the demand and receipt of the sum of sevenpence hereinafter mentioned were his Majesty's postmaster-general, and as such, on, &c. at, &c. (being during the sitting of the present parliament,) demanded, charged, and received of and from Lord *Petre* the sum of sevenpence for the postage of a single letter, sent and conveyed by the post from *Bristol* to *London*, being a distance exceeding 100 miles, and less than 150 miles, and which letter

A Roman
Catholic
peer is not
entitled to
frank.

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was directed to Lord *Petre* at his house in *London*, being the place of his usual residence, the same being the only letter sent and conveyed to Lord *Petre* by the post on that day; that from the passing of the 30 *Car. 2. st. 2.* made to prevent papists from sitting in parliament, the privilege of sending and receiving letters free from postage has been enjoyed by all peers not professing the Roman Catholic religion who have been summoned to parliament, although they have not taken or offered to take their respective seats in the House of Lords; that Lord *Petre* is and was at the time when, &c. a Roman Catholic, and never appeared in parliament in pursuance of his summons, or voted, or made his proxy in the House of Peers, or sat there during any debate, or offered to do so; and that he has never subscribed or repeated the declaration mentioned in the 30 *Car. 2. st. 2.* but that he has taken, made, and subscribed the declaration and oath mentioned in the 31 *Geo. 3. c. 32.* made to relieve papists from certain penalties; that since the passing of the 30 *Car. 2. st. 2.* the sending and receiving letters free from postage has not been enjoyed by any peer professing the Roman Catholic religion, although actually summoned to parliament; that the said privilege has never been enjoyed by any peers being such in her own right, or by marriage, or by any peer under 21, nor have they ever been summoned to parliament; that since the union of *England* and *Scotland*, no peer enjoying his dignity only by reason of his own possession before the union, or by hereditary descent, and who has not been one of the sixteen peers, has enjoyed the said privilege; that the said privilege was, before the 4 *Geo. 3. 24.* enjoyed by such peers as did in fact enjoy the same under certain warrants from time to time issued under the King's sign manual, in which warrants they were exempted from postage by the name and description of the members of both houses of parliament; that in some of these warrants the exemption was expressed to be during the sitting of parliament only, in others which were issued immediately before the 4 *Geo. 3. c. 24.* the exemption was expressed to be granted to the members of both houses of parliament during every sessions of parliament, and for forty days before, and forty days after every sessions; that on the 16th of *April 1735*, the commons of *Great Britain* resolved that the privilege of franking letters by the knights, citizens, and burgesses, chosen to represent the commons in parliament, began by erecting a post-office within this kingdom by act of parliament, and that all letters not exceeding two ounces,

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signed by the proper hand of or directed to any member of that House, during the sitting of every session of parliament, and forty days before and forty days after, every summons and prorogation ought to be carried and delivered freely and safely from all parts of *Great Britain and Ireland* without any charge of postage.

Jervis for the Plaintiff in error. The question in this case depends upon the construction of 4 Geo. 3. c. 24., by which it is enacted, that no letter shall be exempt from postage except such as are therein excepted; the exception applicable to this point is, "all letters and packets not exceeding the weight of two ounces, sent from and to any places within the kingdoms of *Great Britain* or *Ireland* during the sitting of any session of parliament, or within forty days before or forty days after any summons or prorogation of the same, which shall be signed on the outside thereof by any member of either of the two houses of parliament of *Great Britain*, and whereof the whole subscription shall be of the handwriting of such member, or which shall be directed to any member of either house of Parliament of *Great Britain*, or at any of the places of his usual residence, or at the place where he shall actually be at the time of the delivery thereof, or at the house of parliament, or at the lobby of the house of parliament of which he is a member." The subsequent statutes regulating the number and weight of letters do not vary the effect of the above clause upon the present case. From the bill of exceptions it appears, that the Plaintiff is a member of one of the houses of parliament. It is stated that he is a peer of the realm by descent, and he is not only entitled *ex debito justitiæ* to his writ of summons 4 *Injl.* 1. but has actually received it for the present parliament. Neither the 30 *Car.* 2. *stat.* 2. nor 31 *Geo.* 3. c. 32. contain any thing to negative a Roman Catholic peer being a member of the House of Lords. Indeed the inference from the former of those acts is directly the reverse, for it provides that "no person that now is or hereafter shall be a peer of this realm, or member of the House of Peers, shall vote, &c. until he shall have taken certain oaths and subscribed a certain declaration;" the act, therefore, seems to consider that a person may be a member of the House of Peers previous to his having taken the oath. If then the Plaintiff be a member of the House of Peers, he is entitled to the exemption under 4 *Geo.* 3. c. 24. That exemption is not confined to the peers in any particular predicament, since no mention is made of any religious persuasions, but the description is general. No

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analogy can be drawn from peeresses or peers under age, or *Scotch* peers not of the sixteen, because they are not entitled to sit at all, not receiving a writ of summons. The Plaintiff has an unquestionable right to go into the house and take his seat and vote at any moment during the session, provided he take the oaths; and is therefore precisely in the same situation as any other peer, who having received his writ of summons, is prevented by illness or any other occasional disability from taking his seat. It is further to be observed, that as the exemption commences forty days previous to the sitting of parliament, it is impossible to ascertain whether the persons who claim the exemption mean to take the oaths or not. The right to the exemption, therefore, cannot depend upon their taking the oaths.

Abbott for the Defendants. If it could be assumed that every peer is a member of parliament, no further argument would be necessary on the part of the Plaintiff. On that point the whole question turns; and though the Plaintiff be at liberty to become a member of parliament whenever he may think proper, yet he was not so at the time when the letter stated in the bill of exceptions was sent. The legislature seems to have made a distinction between privilege of peers and privilege of parliament. Had it been intended that every peer should be equally entitled to the right of franking, the expressions of the act would have been, "any peer of the realm, and any member of the Lower House of Parliament;" whereas the words of the act are, "any member of either house of parliament of *Great Britain*." The same expressions are used in the 24 *Geo. 3. sess. 2. c. 37.* & 35 *Geo. 3. c. 53. s. 1, 2, 3.* and are taken from the royal warrants which were in use previous to the 4 *Geo. 3. c. 24.* Besides, the act seems to consider the privilege as granted in consequence of the legislative functions of the person to whom it is given; since it directs in *s. 5.* that the votes and proceedings of parliament shall be free of postage; and the first section clearly contemplates the person entitled to the privilege as attendant upon his duty in parliament, which speaks of letters directed to him "at the house of parliament, or the lobby of the house of parliament of which he is a member." And the subsequent statute (a) which has limited the number of letters which are to pass free of postage, appears also to have had in view the number of letters which any member of

(a) 35 *Geo. 3. c. 53.*

parliament could be supposed to send or receive in his official capacity. In farther confirmation of the distinction between privilege of peerage and privilege of parliament, it may be remarked, that peeresses, though entitled to freedom from civil arrest, and to a trial by the peers of the realm, are not entitled to the privilege of franking. It is also observable, that in the act of union, 5 *Ann. c. 8. Art. 23.* "all privileges of parliament" are secured to the sixteen peers of *Scotland*, which are enjoyed by the peers of *England*, and that to the other peers of *Scotland* are secured "all privileges of peers," as fully as they are enjoyed by the peers of *England*, "except the right and privilege of sitting in the House of Lords, and the privileges depending thereon." A member of the House of Commons, disabled by the 30 *Car. 2. stat. 2.* is no longer a member, and therefore it is provided that his place shall be filled up: this provision cannot indeed apply to peers who are not elected; but by a parity of reasoning, when they are disabled, they are no longer members of the house. Usage, if it may be taken into consideration at all, stands directly in opposition to the Plaintiff's claim. Upon the whole therefore, the writ of summons seems only to confer an inchoate right to become a member of parliament, for it is absurd to contend that any one can be deemed a member of an assembly, which he cannot enter during a debate, and in which he can neither sit or vote without incurring penalties.

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The Court took time to consider of their opinion, which was on this day delivered by.

Lord ELDON Ch. J. The question is, Whether, under the circumstances of this case, Lord *Petre* was entitled to receive the letter in question free of postage? If he was entitled to receive it free of postage, it appears from the record that the money in demand was paid by mistake, and Lord *Petre* will be entitled to recover it in this action. Since the passing of the 4 *Geo. 3. c. 24.* which has converted what was before a privilege into what may now be called a legal right, that is a right under an act of parliament, no doubt can be entertained of the Plaintiff's right to sue in this form of action; though previous to the passing of that act, when the exemption was allowed under warrants from time to time issued by the crown, operating as grants of part of the duties vested by parliament in the crown for its own use, some doubts might have been entertained upon the subject, the money

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having been paid over to his Majesty's use. We are now to decide the question on the true construction of the 4 Geo. 3., the title of which is, "An act for preventing frauds and abuses in relation to the sending and receiving of letters and packets free from the duty of postage." The preamble of that act states, that "under colour of the privilege of sending and receiving post-letters by members of parliament free from the duty of postage many great and notorious frauds have been and still are frequently practised, as well in derogation of the honour of parliament as to the detriment of the public revenue, divers persons having presumed to counterfeit the hand, and otherwise fraudulently to make use of the names of members of parliament upon letters and packets to be sent by the post in order to avoid the payment of the duty of postage." In construing these words we should be extremely at a loss to find what exposition should be put upon them, unless we were informed by the record of the true meaning of the expression, "privilege of sending post-letters by members of parliament free from the duty of postage." It is not an expression which necessarily implies that the privilege was enjoyed by all members of parliament, nor does it shew what were the origin, nature, restrictions, limitations, or extensions in practice or usage of that privilege. In this Court therefore, not understanding privilege of parliament, we are obliged to look at the record to enable us to understand the act. The record contains what out of this place we know to be the substance of the parliamentary history of this privilege. It is not stated however by whom this privilege was enjoyed between the years 1660 and 1678; and it is not our province to infer from what is stated to have been the usage subsequent to the year 1678, what was the usage between 1660 and that year. But the record has stated that from the year 1678 the privilege has been enjoyed by all peers not professing the Roman Catholic religion, and that it has not been enjoyed by any peer professing that religion. In 1660, when parliament (a) adopted the scheme for erecting a post-office, which had been first introduced during the usurpation by the act of 1656 (b), the duty of postage was imposed generally on all his Majesty's subjects. We know historically, though we cannot take judicial notice of it, that a clause was proposed in the commons to exempt "the

(a) Vid. 12 Car. 2. c. 35. *Ruffhead's Statutes*, Appendix, p. 175.

(b) See *Scobell's acts*, p. 511. Anno 1656. c. 30.

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knights, citizens, and burgesses chosen and continuing to be members of the parliament of *England* and sitting the parliament from the duty of postage (a).” We know also that the proposition was entertained with considerable doubt; that it was treated by some as a mendicant clause, and that the speaker was very unwilling to put the question upon it (b). However it passed the House of Commons (c). But as it contained no provision for the members of the House of Lords, and as that house could make no addition to a money bill, the clause was there omitted (d). The omission occasioned some difficulty in the House of Commons with respect to the passing of the bill; to facilitate which his Majesty’s ministers gave assurances to the members of the House of Commons that their letters should pass free. Accordingly, on the 14th of May 1661, a warrant was issued by King *Charles* the Second, which is to be found in the Commons’ Journals, vol. 22. p. 463. (e) to this effect: “*Charles* R. The King being informed by his principal secretaries of state that the members of parliament seemed unwilling to pay for the postage of their letters during the sitting of parliament, his Majesty was thereupon graciously pleased to give directions to the farmers of his post-office that all single letters, but not packets, sent by the post-office to or from any member of either house of parliament go free without payment of any thing for the post thereof.” What effect was actually given to the exemption directed by this warrant between the years 1661 and 1678 we have no means of knowing from this record: but the record states, that from the year 1678 no peer professing the Roman Catholic religion, whether considered as a member of parliament, or as a mere peer contradistinguished from a member of parliament, ever did enjoy the privilege. On the

(a) December 16th, 1660, *Comm. Journ.* vol. 8. p. 212.

(b) Vide *Parliamentary Hist.* vol. 23. p. 56.

(c) The bill was agreed to by the Commons and sent to the Lords for their concurrence, December 20th, 1660, *Comm. Journ.* vol. 8. p. 217, 218.

(d) The bill came to the Lords on the 21st of December 1660, and was on the same day twice read, and referred to a committee on the bill for post money. *Lords’ Journ.* vol. 11. p. 220. On the evening of the same day the committee reported it fit to pass with “some few amendments,” which having been twice read, and agreed to, the

bill with the amendments was read a third time and passed. *Lords’ Journ.* vol. 11. p. 222. On the 22d of December 1660, the Commons received the bill with a message from the Lords, desiring their concurrence in the alterations; and on the same day “the amendments to the bill taking away the proviso about letters to members of parliament” were read and agreed to; and the bill sent back to the Lords. *Comm. Journ.* vol. 8. p. 223.

(e) Where the substance of the above facts is stated in the report of a committee appointed by the house in 1736 to consider the subject.

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19th of *February* 1734, the copy of a warrant allowing letters to pass free of postage, dated the 18th of *October* 1727, and directed to the postmaster-general, was presented to the house (a), pursuant to an order of the house (b); by which it appears that the form of the warrant at that time varied from what it was in 1661. After reciting that the revenue had been greatly prejudiced by the free carriage of letters which ought to have been paid for according to the acts of parliament in that behalf, it directs the postmaster-general not to permit any person to send or receive free any letters which ought to be paid for by the said act, except, among other exceptions, "the members of both our houses of parliament during every session of parliament, and for forty days before and forty days after every session, so as the said letters or packets to be franked by virtue of this our authority, for the members of parliament of either house do not exceed the weight of two ounces." It concludes, "and we do also will and require you to make our pleasure known to the members of our said houses of parliament, that for preventing the above abuses which, as we have been informed have been frequently practised with divers persons who not being members of either of the said houses of parliament have yet presumed to indorse on their letters the names of such as were, as also to direct their letters to members of parliament when at the same time such letters do not really belong to or concern the members to whom the same are directed, we do expect that the members of both houses do constantly indorse their own names on their own letters with their own hand-writing and that they do not suffer any letters whatsoever other than such as concern themselves to pass under their frank cover or direction, to the diminution and prejudice of our said revenue. And for so doing this shall be your warrant (c)." This warrant, which restrained the generality of the exemption by requiring that the letters which were to go free of postage should have a particular address and be confined to a certain weight, appears to have been entertained by the House of Commons as a matter, the propriety of which was to be inquired into. If the privilege under the old warrants were general, the house seemed to think that it ought not to be limited without their consent. Accordingly a committee was appointed on the 26th of *February* 1734 to take the copy of

(a) See *Comm. Journ.* vol. 22. p. 385.

(b) *Seventeenth February* 1734. *Comm. Journ.* vol. 22. p. 382.

(c) *Comm. Journ.* vol. 22. p. 393.

the warrant into consideration (a); and, in April 1735 various resolutions were passed concurring in the measures for preventing frauds suggested in the warrant (b). Among these resolutions was that stated at the end of the special verdict. Since these resolutions and this warrant which concerned the members of both houses of parliament, no peer professing the Roman Catholic religion, as we are informed by the record, has *de facto* enjoyed the privilege. In the year 1764 previous to the passing of the 4 Geo. 3. the House of Commons again took the matter into their consideration (c) as a matter of privilege, and entered into several resolutions, the first of which relates to the practice of counterfeiting the hands of members of the house; and they suggest several wholesome regulations for preventing the abuses which had prevailed. They then send a message to the Lords, not desiring their concurrence as in cases of legal regulation, but for the purpose only of communicating their resolutions: the subject is entered into by the House of Lords, and resolutions are there passed (d), the first of which is in *ipsis terminis* the same with that entered into by the commons; and states that the practice of counterfeiting the hands of "members of this house" is become frequent. The resolutions of both houses being framed, the act of 4 Geo. 3. is brought in, after which the house proceeds in its communications by message (e) desiring the concurrence of the Lords. The preamble of that act, which has been already stated, uses the expression "members of parliament," the very expression of the royal warrant, and describes the fraud to be provided

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(a) It is to be remarked that on the 9th of September 1715, (*Comm. Journ.* vol. 18. p. 303.) the House of Commons, on complaint made of great abuses in the privilege of franking, came to resolutions regulating the exercise of that privilege in a manner similar in many respects, to that afterwards adopted; and that on the 23d March 1716-17, a warrant was issued by the crown, couched almost verbatim in the same terms as that which issued in the first year of the reign of George the Second, viz. 18th of October 1727, and which the House of Commons thought it necessary to take into their consideration in 1734. A copy of the warrant of the 23d March 1716-17, is printed in the Appendix to a report of this Case published by Mr. Dillon.

(b) *Comm. Journ.* vol. 22. p. 464, 5. 472, 476.

(c) Committee appointed March 1st 1764. *Comm. Journ.* v. 29. p. 893. Report and resolutions of the committee 28th March, p. 997, 998. Resolutions agreed to and orders made upon the members regulating the exercise of the privilege and a message sent to Lords communicating the same 28th March, p. 1002.

(d) March 29th, 1764. *Lords Journ.* v. 30. p. 531, 2, 3, 4. Communicated to the Commons on the same day. *Comm. Journ.* v. 29. p. 1010. Ordered that a bill be brought in, same day, p. 1011.

(e) Bill passed in the Commons and message to the Lords desiring their concurrence. April 11th 1764. *Comm. Journ.* v. 29. p. 1047.

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against to be, the practice of counterfeiting their hands. The fraud therefore, was one which could not be practised upon those who, according to the exercise of the privilege then prevailing, had not been in the habit of franking letters to any person whatsoever. The question in this case cannot accurately be said to depend upon usage, otherwise than as that usage was the subject of the act of parliament. I agree that if the expression "members of parliament" in the enacting clause of the statute, must be understood to include all members of parliament, or all peers who stand in the predicament in which the record states Lord *Petre* to be, we should not be authorized to give judgment for the Defendant. But the true question seems to be, whether the act must not be taken to be an act regulating the privilege, as that privilege was exercised at the time when the act passed. If the privilege were a privilege of such members of the House of Peers (taking all peers to be members of parliament) as did not profess the Roman Catholic religion, the question is, whether the act must not be taken to be an act regulating the privilege of peers not professing that religion; or whether we are to understand that notwithstanding the act was passed to restrain the right of franking, yet that its operation was intended to be such as to enlarge that privilege and confer it upon those who had it not before? Understanding from this record what was the privilege of members of parliament at the time when the act passed, we are all of opinion that the act must be taken to regulate the privilege with respect to those by whom it was enjoyed at that time, and not to enlarge the number of those who were to exercise it in future. When I say members of parliament, I wish not to be understood as giving any opinion whether Lord *Petre* be or be not entitled to be considered a member of parliament. There is a great difference between privilege of peerage and privilege of parliament. But I think the case of Lord *Petre* in the present instance stands on the same ground as if a writ of summons had been delivered improvidently to a protestant peer during his minority. The minority in such case would operate an incapacity against his sitting in parliament, and I do not know how we are to account for the facts in this record, unless we consider the Roman Catholic peers since 1678, as under a disability similar in effect to that which arises from the minority of a protestant peer. If a minor peer were to receive a writ of summons and demand to have his letters free of postage, the postmaster-general would only have to prove

prove the fact of the minority in order to establish that such a peer was not entitled to the privilege of parliament; though clearly entitled to privilege of peerage. In the case of a Roman Catholic peer having received a writ of summons, as he could not take the oaths directed by 30 *Car.* 2. he could no more be a peer of parliament than a protestant peer during his minority. And I take it that the privilege now in dispute must have been withheld from the one on the same ground as from the other, *viz.* that the privilege is connected with the capacity of doing business in parliament. How far the privilege has been abused will not affect the justness of the reasoning upon principle. But in all the acts which have given the liberty of franking and receiving letters free from postage to public officers, it is expressly given in respect of the business of the offices in which they are employed. I do not assent to the argument, that because Lord *Petre* is entitled to privilege of peerage, therefore he is entitled to privilege of parliament. It is not necessary for us to decide whether his Lordship be a member of parliament or not; but if it were necessary, I will not pretend to say but that there are many acts of parliament containing expressions such as "Lords of Parliament," and "Lords of the House of Parliament," which would apply to any peer before he has taken his seat. But, as it seems to me, the true ground upon which the construction of the 4 of *Geo.* 3. is to be put is this; that the right of members of parliament under the act, is the same with the privilege allowed by the houses of parliament to be exercised by their members previous to the passing of the act; that this privilege (which is not stated in the act to be the privilege of *all* members of parliament,) was then enjoyed by peers, (members of parliament if you choose so to call them,) not professing the Roman Catholic religion; that the enacting clause of the statute when it speaks of members of parliament, means such members of parliament as are mentioned in the preamble, that is members of parliament who independently of the act, were entitled to the privilege which the act intended to regulate; that the object of the act was, that such members should continue to exercise their privilege subject to certain regulations; and the object of the act being to regulate and restrain the privilege where it was, it could not be intended to give the privilege where it was not. Being informed by the record what the meaning of "privilege of sending and receiving post-letters by members of parliament free from the duty of postage," was

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the time when the 4 Geo. 3. was passed; we are all of opinion that the enacting clause can only extend to those who being members of parliament had the privilege independent of the act.

Per Curiam.

Judgment affirmed.

May 15th.

FAULKNER and others v. WISE.

It is not a sufficient ground for rejecting a person as bail, that he is described to be "of A. in the county of B., gaol-keeper."

ONE of the bail in this case (who were to justify by affidavit,) having been described as "of Banbury in the county of Oxford, gaol-keeper," was opposed on that account by Runnington, Serjt. who observed that the Court had refused to allow persons in that situation to become bail.

But the Court thinking that the rule did not extend to this case, inasmuch as it did not appear that the bail was the county gaol-keeper, but might only be a corporation gaol-keeper, and as such have nothing to do with the process of the Court (a), permitted him to justify.

(a) The rule of *Hil. 6 Geo. 2. f. 7. C. B.* after stating that great inconvenience had arisen "by reason that sheriff's officers, bailiffs, and other persons concerned in the execution of process" become bail; orders, that "no sheriff's officer, bailiff, or other person concerned in the execution of process shall be permitted or suffered to become bail in any action or suit depending in this Court." Accordingly in *Bolland*

v. *Pritchard*, 2 Bl. 799. a person merely employed to summon juries was rejected as being a sheriff's officer within the letter of the first part of the rule; and in *Hawkins v. Magnall*, Doug. 466. the keeper of the Poultry compter was also rejected, on the ground as it should seem of his being within the latter words of the rule, viz. "other persons concerned in the execution of process."

May 17th:

AMES v. HILL.

A mere cognovit need not be stamped; but if it contain any terms of agreement it does require a stamp. An agreement to confess judgment for 30*l.* to secure 5*l.* and costs is not an agreement for payment of more than 20*l.* within 22 Geo. 3 c. 58, s. 4. and therefore need not be stamped.

THE Defendant in this case having given a cognovit to the Plaintiff on unstamped paper, whereby he agreed to confess that the Plaintiff had sustained damage in the action to the amount of 30*l.* on which no judgment was to be entered unless the Defendant made default in payment of the sum of 5*l.* by instalments, together with costs to be taxed; the Plaintiff for default of payment entered up judgment thereon.

To set aside this judgment, *Shepherd* Serjt. on a former day obtained a rule *nisi*, on the ground of the cognovit not being on a stamp; contending that it was an agreement for the payment of a sum above 20*l.* and therefore within the provisions of the stamp act.

Against this rule *Marshall* Serjt. shewed cause, and insisted that a cognovit need not be stamped; and that if this were deemed an agreement, it was an agreement to pay less than 20*l.* therefore not liable to the stamp duty (a); observing that the duty on bonds does not extend to the penalty but only the sum secured (b).

The Court took time to consider of the point, and on this day, Lord ELDON Ch. J. said: We are of opinion that a cognovit requires no stamp; and also that if a paper be a mere authority to enter a cognovit, such mere authority requires no stamp: but that if there be any thing of agreement beyond the mere authority a stamp then becomes necessary. A cognovit is a mere acknowledgment of an account, and there is no mutuality; but if any terms be added, it then becomes such an agreement as falls within the provisions of the act. In this case we think the paper in question amounted to an agreement; but that within the meaning of the act, it was an agreement for less than 20*l.*

Per Curiam.

Rule Discharged.

(a) 23 Geo 3. c. 38. s. 4.

(b) s. 1.

PILKINGTON v. GREEN and Another.

May 18th.

THIS was an action by the Plaintiff, as indorsee, against the Defendants as makers of a promissory note for 50*l.* payable nine months after date.

The cause was tried before Lord Eldon Ch. J. at the *Westminster* sittings in this term, when a verdict was found for the Plaintiff with liberty to the Defendant to move to have a verdict entered in his favour. The case in substance was this. The Defendant *Green* having been convicted by the commissioners of excise in penalties to the amount of 150*l.* was taken into custody on a warrant directed to the excise officer at *Oswestry*, "to take and arrest the body of the said J. Green if found, &c. and forthwith to carry the same to the gaol or prison of and for the county

A warrant was directed to an officer of excise by the commissioners, commanding him to apprehend a person convicted in several penalties and take him to prison and keep him there until the amount of the penalties was paid; the officer having arrested the party dis-

charged him upon a promissory note for the amount of the penalties payable at a future day, and the commissioners afterwards approved of his conduct. Held that the discharge was a good consideration for the note, and that an action might be maintained thereon.

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or place where you shall so take and arrest the same, and the same together with a duplicate of this warrant, there to deliver into the custody of the said gaoler or keeper of the said gaol or prison until he shall satisfy and pay the said sum of 150*l*." *Green* being unable to pay the money, the officer agreed to take three notes for 50*l*. each at nine months, one of which was the note in question; and thereupon discharged him out of custody and gave him a receipt for the notes. The conduct of the officer upon this occasion, was afterwards fully sanctioned by the commissioners.

Best Serjt. on the part of the Defendants, now contended that there was no consideration for the note, and that if there were any consideration it was against law; and argued, that the officer whose authority was merely ministerial, could not discharge *Green* on his giving these notes payable at a future day, but was bound to execute the warrant according to its tenor, by taking him to gaol, and keeping him there until he paid the money; that the officer's discharge under these circumstances was of no effect, and that *Green* was liable to be taken again; that this was like the case of a person taken in execution under a *ca. sa.* where the sheriff has no power to discharge his prisoner but must keep him *in salva custodia*, *Love's case*, *Salk.* 28.; and that if the discharge which was the consideration of the note were void at the time when the note was given, the subsequent approbation of the commissioners would not make it good.

Cockell and *Shepherd* Serjts. *contra*, were proceeding to shew cause in the first instance, but

The Court strongly inclined to support the verdict, and took till the next day to consider; when,

Lord ELDON Ch. J. said: We have looked into the case cited from *Salkeld*; and are of opinion that under the circumstances of this case, the note, having been accepted by those who were interested in it, has a sufficient consideration to support it.

Per Curiam.

Postea to the Plaintiff.

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DE SYMONDS v. SHEDDEN.

May 19th

ASSUMPSIT on a policy of insurance, on a ship and goods at and from *London* to *Emden*, "beginning the adventure on the said goods and merchandizes from the loading thereof on board the said ship." At the end of the policy there was a memorandum "whereby the said insurance was declared to be on 15 hogsheads of tobacco, marked B. S. No. 51 and 65, valued at 550*l*."

Declaration on a policy on ship and goods at and from *London* to *Emden*, "beginning the said adventure on the said goods, &c. from the loading thereof on board the said ship;" in the policy there was a memorandum where by the said insurance was declared to be on 15 hogsheads of tobacco marked "B. S. No. 51 and 65." Special demurrer, 1st, because the goods were not averred to have been put on board at *London*: 2dly, because the goods were not alleged to have been marked or numbered as in the memorandum, but only thus: "15 hogsheads the goods, &c. in the said policy mentioned;" 3dly, because the Plaintiff was stated to have been interested until and at the time of the loss, without shewing that he was interested at the time of the high seas.

The first count of the declaration after setting out the policy and averring the promise, stated, "that before the making of the said writing or policy of insurance divers to wit 15 hogsheads of tobacco the goods, wares, and merchandizes in the said policy mentioned" of great value, to wit, of the value of 800*l*. were loaden and put on board the said ship, and continued on board the said ship from thence until and at the time of the loss hereinafter next mentioned, and that the Plaintiff until and at the time of the loss and damage hereinafter mentioned, was interested in the said premises in the said writing or policy of assurance mentioned to a large value, to wit, to the value of all the monies so insured by them thereon, and that the said insurance so made by him was, so made for and on his account and for his own use and benefit, to wit, at *London* aforesaid in the parish and ward aforesaid. And the said Plaintiff further saith, that afterwards, to wit, on, &c. the said ship with the said goods and merchandizes so loaden on board her as aforesaid, departed and set sail on her said intended voyage towards *Emden* aforesaid, and that afterwards and during her said voyage, to wit, on, &c. after her departure from *London* aforesaid and before her arrival at *Emden* aforesaid, on the high seas, by and through the mere dangers of the seas, &c. was greatly damaged, &c. and the said goods and merchandizes thereby then and there in the said voyage were wetted, damaged, and wholly spoiled, and rendered of no use or value to him the said Plaintiff.

To this there was a special demurrer, assigning the following causes; "For that it is not alleged nor does it appear in or by the said first count of the said declaration that any goods or merchandize were loaden on board of the said ship in that count mentioned, at *London* in the said writing or policy of insurance men-

the policy being made; 4thly, 'cause no venue was laid to the allegation of loss on the high seas. *Semb.* that the declaration was bad.

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tioned, or that the said goods and merchandize which are in that count alleged to have been on board of the said ship at the time of the loss in that count mentioned were loaden on board of the said ship at *London* aforesaid or at what time or at what place the said goods and merchandize were loaden on board the said ship, whereas the beginning of the adventure of the Defendant upon the goods and merchandize mentioned in the said writing or policy of assurance in the said first count of the said declaration mentioned is by the said writing or policy of insurance declared to be from the loading thereof on board the said ship; and the said Defendant is not according to the meaning and effect of the said writing or policy of insurance in the said first count mentioned liable for losses sustained by or upon any goods or merchandize which were not loaden on board the said ship at *London* aforesaid, and also for that it is not alleged nor does it appear in or by the said first count of the said declaration that the said hogsheds of tobacco therein alleged to have been loaden on board the said ship were marked or numbered in the manner in the said writing or policy of insurance mentioned whereas the said Defendant is not according to the meaning and effect of the said writing or policy of insurance liable for losses sustained by or upon any goods except 15 hogsheds of tobacco marked and numbered in the manner in the said writing or policy of insurance in that behalf mentioned. And also for that it is not alleged nor does it appear in or by the said first count of the said declaration that the said Plaintiff or that any or what other person had at the beginning of the said adventure any interest or concern in the said goods therein alleged to have been loaden on board of the said ship, or at what time the said Plaintiff began to have any interest or concern therein; and also for that it is not alleged nor does it appear in or by the said first count of the said declaration where or at what place the said goods therein mentioned were wholly spoiled and rendered of no use or value to the said Plaintiff, but the said goods are therein and thereby alleged to have been wholly spoiled and to have been rendered of no use or value without any place or venue being in that behalf mentioned; and also for that the said first count of the said declaration is in various other respects insufficient, informal, and defective."

Joinder in demurrer.

Heywood Serjt. in support of the demurrer. 1st, It should have been averred that the goods were put on board the ship at *London* :

for if they were put on board at any other place, the policy has not been complied with. *Hodgson v. Richardson*, 1 Bl. 463. That was the case of an insurance at and from *Genoa*, the cargo having been taken in at *Leghorn*; and the ship having lain above five months at *Genoa* waiting for convoy, which circumstance, though known to the insured, was not communicated to the underwriter. The words of Mr. Justice *Wilkes* are very strong: "The fact disclosed by this policy is not true, that *Genoa* is the loading port, for so it must be understood; and in such cases I will not speculate on the materiality or immateriality of the fact." The policy in this case being at and from *London*, the subsequent words, "beginning the adventure on the said goods and merchandize from the loading thereof on board the said ship," are necessarily confined to a loading at *London*. It is impossible to argue that the words "to wit at *London* afore said in the parish and ward afore said" can be so applied to the averment of loading as to describe the place where that loading was made; since they do not occur until after the intervention of several independent and distinct averments. Nor will the Court read the declaration with an endeavour to support it, for the rule has been established ever since the time of *Plowden* that the intendment is against the party averring. 2dly, It was necessary to shew that the goods were marked and numbered in the manner stated in the policy, since the undertaking of the underwriters does not extend to any goods not so marked and numbered. 3dly, It ought to appear that the assured was interested in the goods not only at the time of the loss, but also at the time of making the insurance: for otherwise the policy is void. *Sadlers' Company v. Badcock*, 1 Wils. 10. *Hibbert v. Carter*, 1 T. R. 745. *Perchard v. Whitmore*, *Guildhall* sittings, after *Michaelmas* term 1786, before *Buller J.* (a) 4thly, There

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(a) *Perchard v. Whitmore*, *Guildhall* sittings, after *Mich. Term* 1786.

Action on a policy of insurance on board the ship *L'Aurore* at and from *Cette* to *Guernsey*. In the declaration it was averred that *Peter Maingy* and *Nicholas Maingy*, until and at the time of the loss were interested in the goods and merchandizes in the said policy mentioned to a great value, to wit, &c. and that the said insurance was so made for the said *P. M.* and *N. M.* and for their account. In the course of the cause the Plaintiff called Mr. *Le Mesurier*, who was objected to as an interested witness

He admitted that having no interest in the goods insured when the policy was effected, he had since become a partner with *P. M.* and *N. M.* and had taken a share of all the stock, and among other things of the goods insured. Upon this Mr. *Le Mesurier* was rejected. But *Counsel* for the Defendant pressed that the Plaintiff might be nonsuited, insisting, that as Mr. *Le Mesurier* was interested in the goods insured, the averment in the declaration was not proved.

BULLER J. said, he thought the Plaintiff ought not to be nonsuited upon that point, for that Mr. *Le Mesurier* was not interested at

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There are two material facts in this declaration; one the promise to pay in case of a loss, and the other that a loss took place. To the latter of these no venue is assigned. And though it be true that the allegation of the promise having been made in an *English* county, will draw to it the cognizance of the other fact which took place out of *England*, provided a venue in *England* be alleged, yet it is necessary to allege a venue, as in the case of a bond made abroad.

Bayley Serjt. contra. 1st, It sufficiently appears that the goods were put on board at *London*. The several allegations of the loading the goods, the value of the goods, the interest of the plaintiff, and that the insurance was made on his account, are all parts of one sentence; and the words, "to wit, at *London*, aforesaid in the parish and ward aforesaid," with which that sentence concludes, apply to the whole, and may be considered as inserted at the end of every branch. The averment is not the less certain because it comes under a "to wit," and if the "to wit" be omitted, the loading, which is the first member of the sentence, is alleged to have taken place at *London*. Besides, it is not material that it should appear upon record that the goods were put on board at the place mentioned in the policy. The meaning of the expression in the policy is, that the risk shall begin from the time of the goods being laden on board the ship at the place mentioned in the policy; but whether the goods be first laden on board the ship before or after her arrival at that place the policy will be equally complied with. It may be material, indeed, in many cases to represent to the underwriters at what place they were actually put on board. And the case of *Hodgson v. Richardson* was decided entirely on the want of a proper representation. 2dly, It is sufficient to observe, that the declaration avers that 15 hogheads of tobacco, "the goods mentioned in the policy," were put on board. 3dly, It is not necessary that the party insuring should have an interest at the time of the policy being effected, for perhaps he may insure on the knowledge of goods about to be consigned to him, and a reasonable expectation has always been held the subject of an insurance. If it were otherwise, policies on "goods shipped or to be shipped" could not be supported.

the time of making the policy to which the averment of interest related, and the Plaintiff brought the action for those who were interested at the time.

Many other points were contested in the cause, and a verdict was found for the Defendant.

4thly,

4thly. It appears that the loss was on the high seas, and it is a general rule that the venue where the cause is laid draws to it the trial of all facts arising abroad. In 6 Co. 47. b. a case upon a policy of insurance is mentioned which is precisely in point. To the same effect are *Lutw.* 699. *Ilderton v. Ilderton*, 2 H. Bl. 161. and *Neale v. De Garay*, 7 T. R. 243.

The Court inclined to think the declaration bad, but took time to consider of their opinion.

And on a subsequent day gave leave to the Plaintiff to amend without costs.

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STANWAY *qui tam* v. PERRY, Sheriff of Essex.

May 14th.

THIS action was brought to recover the penalty imposed by the 29 Eliz. c. 4. on sheriffs for extortion.

At the trial before Lord Eldon Ch. J. at the sittings after Hilary term, the Plaintiff, in order to shew that the action was commenced within a year, gave in evidence two writs, the one a *capias ad respondendum* issued on the 8th of November 1799, and the other a *capias per continuance* issued on the 13th of the same month; the former of these writs issued within a year after the offence committed, but the latter did not: the Defendant was served with the latter writ only. The declaration was of *Michaelmas* term. A verdict was found for the Plaintiff. After the verdict was given, it was discovered and objected by the Defendant's counsel, that the first writ had never been returned, and could not therefore be connected with the second. On an affidavit of this fact a rule was obtained calling on the Plaintiff to shew cause why the verdict should not be set aside and a nonsuit be entered.

In a penal action a *capias ad respondendum* issued within a year after the offence committed, but never served on the Defendant or returned; after the expiration of the year, but in the same term, a *capias per continuance* issued and was duly served and returned; the declaration was of the term in which both writs issued. Held that the first writ not having been returned could not be connected with the second so as to support the action.

Shepherd Serjt. now shewed cause, and contended, that as the declaration in this case was of the same term with that in which the first writ issued, namely, *Michaelmas* term 1799, it was not necessary that it should have been returned in order to support the action; for although in *Harris v. Woolford*, 6 T. R. 617. it was held necessary that the first of two writs issued in that case should appear to have been returned in order to save the statute of limitations, yet it was to be observed that there the declaration was not delivered within a year after the first writ issued; whereas in *Parsons v. King*, 7 T. R. 6. the Court held, that if the Plaintiff declare any time within a year after a writ issued in time to save

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his action, it need not be shewn that such writ was returned. He said that this case, therefore, might be considered as if the second writ had never issued at all.

Bayley Serjt. *contra*, relied on *Harris v. Woolford*; and observed, that in *Parsons v. King*, as one writ only had issued and the Plaintiff had declared within a year, it must be understood that he had declared on that writ; whereas in the present case, as the Defendant had been served with the second writ only, it was evident that he could only have appeared to the second writ, and that the Plaintiff must be taken to have declared upon that writ only. He added, that this very point had been decided in this Court in a case of *Field qui tam v. Carrol, M. 32 Geo. 3.* before *Eyre* Ch. J. who nonsuited the Plaintiff on a similar objection.

The Court agreed that the distinction between the cases cited proceeded on the circumstance of two writs having issued in the former and one only in the latter; and held, that if two writs be issued, one within a year after the offence committed and the other not, it is necessary that the first writ should be returned in order to connect it with the second, and thereby make the action appear to have been commenced in due time.

The objection, however, not having been taken till after the verdict had been given, the Court refused to enter a nonsuit, but made the rule absolute for a new trial.

May 24th.

PRICE v. MESSENGER and Another.

If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant according to 24 Geo. 2. c. 44.

If the warrant be to seize "stolen goods," and the officer seize goods which turn out not to have been stolen, he is still within the protection of 24 Geo. 2. c. 44.

TRESPASS for seizing and taking a quantity of moist sugar, and a quantity of tea, and nails of the Plaintiff, and for assaulting and imprisoning his person, and for carrying the Plaintiff, together with the above goods, before a justice of the peace, under colour and pretext that part of the said goods, to wit, the sugar had been before then feloniously stolen from some ship in the *Thames*, and had been found concealed in certain premises of the Plaintiff in which he carried on his trade and business of a grocer. There was a second count for assaulting and imprisoning the Plaintiff generally, and a third for seizing and taking away his goods.

The Defendants pleaded not guilty as to all but taking away the tea and nails, as to which they suffered judgment by default.

This cause came on before Lord *Eldon* Ch. J. as well to try the issue joined, as to assess damages upon the judgment by default at the *Westminster* sittings after last *Hilary* term. The evidence was in substance as follows: The Plaintiff was a grocer living on the *Surry* side of *Westminster* bridge, and the Defendants two constables of one of the police offices in *Westminster*. On the 2d of *April* 1799 an information was exhibited against the Plaintiff at the police-office, upon which the following warrant was granted. “*Surry and Middlesex* to wit. To all constables and other his Majesty’s officers of the peace whom these may concern. Whereas complaint upon oath hath been this day made unto me one of his Majesty’s justices of the peace for the said counties by *Henry Nash* that there was lately stolen from some ship or vessel lying in the River *Thames* a quantity of sugar and that there is just cause to suspect that the said stolen goods are knowingly *concealed or deposited* in the shop warehouses outhouses yard or premises belonging to and occupied by *Price* and Co. situate the second house in *Coads Row* on the *Surry* side of *Westminster* bridge nearly opposite to *Astley’s* theatre, these are therefore to require you forthwith to make diligent search in the day time in the said premises for the said stolen goods, and if you find the same or any part thereof that then you secure the said goods, and bring the person or persons in whose custody you find the same before me or some other of his Majesty’s justices of the peace to be examined and dealt with according to law. Given under my hand and seal the 2d day of *April* 1799, *P. Colquhoun*.” On the same day on which the warrant issued the Defendants went to the Plaintiff’s house, and finding some sugar of a particular quality selling under prime cost, and a bag of nails and two parcels of tea of which no satisfactory account was given, sent to the office requesting instructions for their conduct respecting the tea and nails which were not mentioned in the warrant; upon which they were ordered by the magistrate to bring the sugar, tea, and nails to the office. This they accordingly did, and at the same time carried the Plaintiff before the magistrate, who discharged him for that day, but desired him to attend the next morning. The Plaintiff having attended the next morning, and no sufficient evidence having been produced against him, he was discharged altogether, and his property was afterwards restored. It was proved that the Defendants had conducted themselves with great civility towards the Plaintiff. Lord *Eldon* directed the jury that the war-

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rant was no justification as to any thing but the assault, imprisonment, and taking the sugar, and that the verbal orders of the magistrate under which the Defendants seized the tea and nails would not avail them. For the Plaintiff, however, it was insisted that even the assault, imprisonment, and taking the sugar under the circumstances of the case, were not justified by the warrant: on the other hand, it was contended that they were justified by the warrant which was granted by virtue of the bum-boat act (a); and that at all events a copy of the warrant should have been demanded, pursuant to 24 Geo. 2. c. 44. His Lordship having desired the jury to distinguish the damages incurred by the seizure of the tea and nails, from those incurred by the assault imprisonment and seizure of the sugar, a verdict was found of 30*l.* for the former, and 70*l.* for the latter.

A rule having been moved for, calling on the Plaintiff to shew cause why this verdict should not be set aside, it was granted as to the 70*l.* the Court intimating an opinion that as to the 30*l.* the verdict could not be disturbed.

Shepherd and *Best* Serjts. now shewed cause. The main objection to the Plaintiff's recovery is, that no demand was made of a copy of the warrant under which the Defendants acted, pursuant to 24 Geo. 2. c. 44. But no officer can avail himself of that objection, unless he shew that he has acted in obedience to the warrant of a magistrate, *per Lord Mansfield, Dawson or Lawson v. Clarke*, cited 3 Bar. 1767; whereas in this case the Defendants exceeded the authority delegated to them by the magistrate. Where the warrant itself authorises others to act in a matter not within the jurisdiction of the magistrate, he is personally responsible; but where an officer exceeds his authority, the magistrate who gave that authority is not liable for such excess. Here the warrant was to seize stolen sugar, and the officers were bound at their peril to seize stolen sugar or none at all. In the case of *Boote v. Cooper*, cited 1 T. R. 535. where the warrant was to enter and search for concealed goods, it was rightly held that the officer was justified in entering and searching, though no con-

(a) 2 Geo. 3. c. 28. s. 7. which enacts, that it shall be lawful for any justice of the peace, upon information on oath, that there is cause to suspect that any merchandizes &c. (suspected to have been stolen or unlawfully come by, or taken from some ship or vessel in the river Thames) are concealed in any dwelling-house, warehouse, &c. by warrant under his hand and seal, to cause every such dwelling-house, &c. to be searched in the

day-time; and if any such merchandizes &c. shall be found therein, to cause the same to be deposited in some place of safety, and also to cause the person in whose house &c. the same shall be found, to be brought before him; and if such person shall not give a satisfactory account how he came by the same, he shall be adjudged guilty of a misdemeanor.

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cealed goods were found, that being no excess of authority; but in *Entick v. Carrington*, 2 *Will.* 286. *De Grey* Ch. J. seems to have considered that an officer who, under a warrant to search for stolen goods, should seize the goods of the owner of the house, would not be within the protection of the 24 *Geo. 2. c. 44.* Supposing the warrant itself to be legal, still the Defendants have not executed it according to its true spirit; for they were not to decide wantonly that any sugar found in the Plaintiff's house was stolen sugar, but to exercise a sound discretion. Now the sugar seized by the Defendants appears to have been exposed in a situation in which no man would place goods subject to seizure. Though the warrant speaks of sugar deposited or concealed, yet the word "deposited" when applied to stolen goods, must mean deposited for the purpose of concealment; especially as it is connected with the word "concealed."

Cockell and *Bayley* Serjts. *contra*. If the officers acted in obedience to the warrant, it is altogether immaterial whether the warrant were legal or illegal; for if legal the officers and the magistrate are both justified; if illegal the magistrate alone is responsible. It would be highly dangerous to allow the officer to exercise his judgment whether the warrant directed to him by the magistrate were good or not; it is his duty to obey. The warrant in this case only asserted that there was stolen sugar in the Plaintiff's house, and ordered the officers to seize it; now it was impossible for them to ascertain whether the sugar they found was stolen or not, or how much of it was in that predicament.

LORD ELDON Ch. J. The ground upon which I have formed my opinion in this case may be stated in a very few words. The public interest requires that officers who really act in obedience to the warrant of a magistrate should be protected. In such cases, therefore, the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted a warrant without having jurisdiction, as where the warrant which he has granted is improper. The statute provides that no action shall be brought against an officer for any thing done in obedience to any warrant of any justice of the peace, unless a demand hath been made of a copy and perusal of the warrant; and that in case, after compliance with such demand, any action shall be brought against such officer for any such cause as aforesaid, without making the justice a Defendant, a verdict shall be given for the Defendant, "notwithstanding any defect of jurisdiction in such justice;" and if such action be brought jointly against such justice and also against such officer, on proof of such warrant,

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warrant, the jury shall find for the officer "notwithstanding any such defect of jurisdiction as aforesaid." The act therefore takes it for granted, that an officer may be said to act in obedience to the warrant of a justice of the peace, though such justice had no jurisdiction, and though the warrant be an absolute nullity. For it is as much a defect of jurisdiction, if the justice grant an improper warrant in a case over which he has jurisdiction, as if he had no jurisdiction over the case at all. The only question therefore is, Whether the act of the officer were done in obedience to any warrant of any justice of the peace? And considering the nature of the protection intended to be given to officers by this act, I think it reasonable to say that the Defendants in this case acted in obedience to the warrant within the meaning of the legislature. If this be so, it is sufficient for the Defendant to say that no demand of a perusal and copy of the warrant was made, whether that warrant on production would have afforded a defence or not. It was not agreed by the Plaintiff's counsel whether the warrant itself were legal or illegal. Now suppose it to have been legal: the officer acted with as much precision in the execution of the warrant, as the justice in granting it. If the information given to the latter was insufficient to enable him to describe the goods with certainty, the former was unable to ascertain with certainty what goods he was directed to seize. Then suppose the warrant to have been illegal, it was not competent to the Defendant to judge of its legality. If he executed it in the only way in which it was capable of being executed, namely, by making it attach on all goods which fell within the description contained in it, he acted in obedience to it: and having done so, he is entitled to avail himself of the protection of the act. Whether the warrant would have afforded a defence to the justice or not I shall give no opinion.

HEATH J. The only question is, Whether the constable acted in obedience to the warrant? Whether the warrant were legal or not, we are not called upon to decide. When this Defendant seized the teas he was not acting in obedience to the warrant; but when he seized the sugars he was. The warrant, after stating that certain sugars had been stolen, and that there was reason to suspect that the same were concealed or deposited in the Plaintiff's house, directs the Defendant to seize them. Under these circumstances, he could not act otherwise than he has done.

ROOKE J. The Defendant appears to me to have acted in obedience to his warrant, and therefore to come within the protection of

the statute. If the warrant were illegal the Plaintiff might have proceeded against the justice: but as he has chosen to abandon that remedy and to proceed against the constable, he is only entitled to a verdict for such damages as arose from that seizure which was not made in obedience to the warrant.

Verdict to be entered for the Plaintiff for 30*l.* only.

DICKER v. ADAMS, Executor.

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May 26th.

INDEBITATUS assumpsit. The Defendant pleaded first *non assumpsit*; secondly, *non assumpsit infra sex annos*; and thirdly, a set-off. On the first plea issue was joined; and to the two last there was a demurrer. No joinder in demurrer having been put in, the Plaintiff signed judgment. After this a writ of inquiry of damages on the two counts upon which judgment had gone by default was executed.

A rule *nisi* was obtained upon a former day to set aside this writ of inquiry, and all proceedings thereon, for irregularity; because, as issue was joined on *non assumpsit*, the Plaintiff should have entered the issue and awarded jury process as well to try the issue joined as to inquire of the damages on the interlocutory judgment.

Shepherd Serjt. now shewed cause against the rule, and *Lens* Serjt. in support of it, cited *Tidd's Pract. K. B.* 795. *ed.* 2. (a)

The Court were clearly of opinion that as an issue was joined upon the record, the Plaintiff ought not to have executed a writ of inquiry on the two pleas on which judgment had gone by default.

Rule absolute.

(a) P. 591. *ed.* 1.

PARIENTE, Assignee, &c. v. CASTLE, One. &c.

May 26th

THIS was an application to discharge the Defendant from the custody of the warden of the Fleet as to the this case, because there was no judgment docketed a the rolls of the Court whercon to found the writ of

Bayley Serjt. in support of the rule.

Shepherd Serjt. *contra*.

The Court rejected the application, saying it denied.

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May 26 b.

ANDERSON v. PITCHER & Ux.

A warranty to depart with convoy is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be then obtained.

THIS was an action for money had and received to the use of the Plaintiff by the Defendant's wife, before her intermarriage with the Defendant.

This cause was tried before Lord Eldon C. J. and a special jury at the *Guildhall* sittings after *Hilary* term, when the following case appeared in evidence:—On the 31st of *October*, 1795, the Plaintiff underwrote a policy of insurance on the *Golden Grove*, at five guineas *per cent*, “at and from *London* to all or any of the *West India* islands, *Jamaica* and *St. Domingo* excepted, with leave to go to the place of rendezvous to join convoy, and warranted to sail from thence with convoy for the voyage.” The ship having been lost soon after she sailed from *Portsmouth*, the Plaintiff paid 284*l.* 5*s.* under the policy. To recover back that sum the present action was brought, the Plaintiff being of opinion that the *Golden Grove* never received her sailing instructions, and therefore had not fulfilled the warranty to depart with convoy. It now appeared that the *Golden Grove* arrived at *Spithead* about nine o'clock in the morning of the 15th *November* 1795; that she came round under the care of the first mate, the captain himself being on shore at *Portsmouth*; that on the day preceding (the 14th) sailing instructions were delivered at *Portsmouth* to all such ships as applied regularly for them, and that the captain of the *Golden Grove* previous to her arrival made enquiry concerning sailing instructions, but found that they could not be obtained until the ship was actually in sight; that on the 15th of *November*, by day-light, Admiral Sir *H. C. Christian*, the commander of the convoy, got under weigh, but had not entirely quitted the roadstead until about four o'clock in the evening; that when he got under sail he left the *Trident* frigate to bring up such vessels as did not weigh anchor with him; that about one o'clock of the same day the captain of the *Golden Grove* repaired on board, and got under weigh, at which time the *Trident* had also got under weigh, and both the admiral's ship and the *Trident* had then proceeded so far, that it was clear the *Golden Grove* could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter; that on the next day, between 10 and 12 o'clock in the forenoon, the captain

of

of the *Golden Grove*, being then only a quarter of a mile from the admiral's ship, went on board her, and obtained sailing instructions; that soon afterwards the *Golden Grove* was lost, having been, from the time of her departure to that of the loss, under the protection of the convoy. Lord *Eldon* directed the jury, that although under some circumstances sailing instructions might be dispensed with, yet that this did not appear to be a case of that kind; that the *Golden Grove* did not appear to him to have departed from the place of rendezvous with convoy, since she had either not arrived time enough to obtain sailing instructions, or if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before he failed. The jury found a verdict for the Plaintiff.

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Early in this term a rule *nisi* for a new trial was obtained, in support of which affidavits of the Defendant's attorney, and of several naval men, to the following effect, were filed:—That the point upon which the verdict had proceeded was a matter of surprize upon the Defendant, it having been understood that the cause would be tried on the single question, Whether sailing instructions had ever been obtained? that it is the constant practice for commanders of convoys to give sailing instructions to vessels which sail under their protection, after leaving the place of rendezvous, and that such vessels are always understood to depart with convoy; that sailing instructions are never given to the captain of any vessel until the vessel is in sight; that when the Admiralty directs the commander of a ship of war at *Spithead* to take under convoy a fleet bound to the westward, he is generally instructed to put to sea thirty hours after the wind has been fair, with a view to give time to the ships in the *Downs* to come round to *Spithead*; and, that as such ships frequently do not arrive until the convoy is under weigh, and are often prevented, by blowing weather, from getting their sailing instructions at the place of rendezvous, it is usual for their captains to obtain them the first time the convoy is brought to at sea.

Shepherd Serjt. in the course of the term shewed cause; and after observing, that as the facts of this case had been before the Court upon a former occasion in *Webb v. Thompson* (a), they would not interfere, unless they entertained very great doubts upon the question; contended, that the *Golden Grove* was not within any of the exceptions to the general rule, which required sailing instruc-

(a) *Ante*, vol. i. p. 5.

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tions in order to the fulfilment of a warranty to depart with convoy; and that consequently, as she had not obtained them before her departure from the place of rendezvous, she had not fulfilled the warranty in this policy; that in this case the commander of the convoy was ready to have given sailing instructions, had they been applied for; and that, if such a latitude as was contended for was to be allowed, it must hereafter be deemed sufficient if ships obtain their sailing instructions the day before their arrival at the port of discharge.

Best Serjt. in support of the rule. Although the *Golden Grove* had not obtained sailing instructions on the 15th, when she departed from *Spithead*, yet she received them early enough on the next morning to constitute a departure with convoy within the spirit of the warranty. The words of the warranty do not require that sailing instructions should be obtained, and therefore a greater latitude may be allowed than in a construction of the very letter of the warranty. Usage of trade has been constantly admitted in the construction of warranties to depart with convoy; thus, if a ship depart from the port of *London* and join convoy at *Portsmouth* or the *Downs*, it is a sufficient compliance with the warranty to depart with convoy (a). Usage therefore may be admitted in the present case, to shew that sailing instructions are not necessary till the ship has actually put to sea. No case has been cited to shew that they are necessary at the time of breaking ground; if they be obtained as soon as they become necessary for the protection of the ship, it is sufficient; and, as the commander of the convoy in this case gave sailing instructions to other ships at the same time that he gave them to the *Golden Grove*, it appears that he considered it sufficient for their protection to deliver them at that time. It may be contended that the case of *Victoria v. Cleeve*, 2 Str. 1250. *Park's Insur.* 348. is distinguishable from this; for there it was impossible to get sailing instructions. But *Veeton v. Wilmot*, *Park's Insur.* 341. note a. is in point, for there sailing instructions were not applied for till after the convoy was under sail. No neglect is imputable to the captain in this case; he applied for his sailing instructions before the *Golden Grove* arrived, but was refused them; she actually did arrive on the morning of the 15th, before the convoy had left the place of rendezvous; but, as the convoy was then under sail, it may have been dangerous for him to put out a boat. On

(a) *Vide ante*, p. 115.

the morning of the 16th the sailing instructions were obtained without any inconvenience having arisen from the want of them, the ship having remained the whole time under the protection of the guns of the convoy.

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Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ELDON, Ch. J. This action is brought to recover back 284*l.* 5*s.*, paid by the Plaintiff as under-writer of a policy on the ship *Golden Grove*, to the Defendant, the assured in that policy, under the supposition that the loss which happened was within the terms of his undertaking. He now says, that on a better examination of all the circumstances attending that loss, he finds he was not liable, as he had erroneously supposed, and therefore, that the money which he paid to the Defendant under a mistake may be recovered back by him. This is a case in which the convoy appointed by government was ready to give sailing instructions at the place of rendezvous, to all such vessels as were ready to receive them. And it appears to me, that if the captain of the *Golden Grove* had been on board his ship at nine o'clock in the morning, when she arrived, he might have obtained sailing instructions from the frigate before he left the place of rendezvous. In point of fact, however, the admiral was under weigh before the *Golden Grove* arrived, and the frigate was under weigh before the captain was on board. It is clear also, that the captain of the *Golden Grove* could not have gone on board the admiral that night, and it was very doubtful whether he could have gone on board the frigate. The question for the Court to decide is, Whether a new trial should be granted, the jury having determined that, under all the circumstances of the case, the warranty was not complied with? Considering that the case came to trial chiefly on the question, Whether or not any sailing instructions were ever obtained by the *Golden Grove*? and that the Defendant was somewhat surprised by the point raised at the trial, respecting the time at which the sailing instructions were obtained, I should wish a new trial to be granted, if I could see any proposition of law to be stated to a jury in the Defendant's favour. But it seems to me, as well from the affidavits as the evidence, that the Defendant would not be entitled to retain a verdict if he should obtain one. The policy contained this warranty: That the ship should be at liberty to go to the place

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of rendezvous to join convoy, and that she should sail from thence with convoy for the voyage. It is now too late to say that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge Lord *Holt* (a). It is true, indeed, that Lord *Mansfield*, who may be considered the establisher, if not the author, of a great part of this law, expressed himself thus: "Wherever you render additional words necessary and multiply them, you also multiply doubts and criticisms (b)." Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned. If, therefore, the question before us be still undetermined, the inclination of my mind will be to adhere to the letter of the contract; and I feel the more disposed to do so, since it appears most clearly, from the affidavits which have been produced, that no man of the highest experience in the navy can ascertain, by any reference to usage, what other interpretation ought to be adopted. The first question is, What is the meaning of the words, "departing with convoy"? Do they mean departing with sailing instructions in all cases? or, Do they mean departing with sailing instructions in a case circumstanced like this? It is clear that sailing instructions are not necessary in all cases: but the decisions authorize me in saying, that in general cases they are required; and if that be so, I do not find any thing in the circumstances of this case which can bring it within any of the exceptions to the general rule. In *Hibbert v. Pigou* (c), Lord *Mansfield* laid it down generally, that sailing instructions are essential to convoy. Mr. Justice *Willes*, indeed, entertained doubts upon the subject; and Mr. Justice *Buller* declined giving any opinion upon that point. In that case, however, it was not necessary to decide whether sailing instructions were essential or not; for though Captain *Mann* had neglected no means of obtaining sailing instructions from the *Glorieux*, yet it did not appear, upon the first trial, that the *Glorieux* was a convoy appointed by government, and therefore the Court was obliged to hold that the warranty was not fulfilled. It is true that it was determined in

(a) *Letbalier's case*, 2 *Salk.* 443.(b) In *Lilly v. Ewer*, *Doug.* 74.(c) *Park's Insur.* 339.

Victoria v. Cleve, where the convoy was appointed by government, that sailing instructions may be dispensed with where no default appears on the part of the master. It being once decided, that a convoy within the terms of the policy means a convoy appointed by government, it seems to follow of necessity that the ship must depart with sailing instructions, if by the due diligence of the master they can be obtained. The value of a convoy appointed by government, in a great measure arises from its taking the ships under control as well as under protection. But that control does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Indeed, the reason of that rule which requires that the convoy should be appointed by government, shews the necessity of having sailing instructions; since without them the ship does not stand in that relation or under those circumstances in which she can take the full benefit of the government convoy. If the fleet be dispersed by a storm, how is she to learn the place of rendezvous? If it be attacked by the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force? It has been contended, that if she be under the protection of the guns it is sufficient. But will it be contended that, provided she be under the protection of the guns at her departure, though sailing instructions be never obtained during the voyage, or not till the last day of the voyage, the warranty is complied with? Either sailing instructions are not necessary, or, if they be necessary, they must be so at some given period, and can only be dispensed with in some particular cases. Then can any other period be assigned but the beginning of the voyage? Some of these affidavits say, that if the ship has obtained her sailing instructions at any time before she is lost, it is sufficient; but that she must obtain them before she is lost. Are we then to depart from the terms of the contract between the underwriter and the assured, in order to let in a construction which is at variance with the reason on which that contract is founded? Let us consider the exceptions to the general rule which have been admitted. Respecting *Victoria v. Cleve* there can be no difficulty, since the very ground of the decision in that case was, that there was no default in the master, and that no activity of his could have procured sailing instructions, he having come out of the port of *Fleckery* in obedience to the signal of the convoy then off that port, and having been prevented from receiving sailing instructions before

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fore the loss of the ship, by the roughness of the weather. In *Webb v. Thompson*, Mr. Justice *Buller*, with the assent of the Court, stated, with reference to a case arising out of the loss which happened to this very ship, that, generally speaking, unless sailing instructions were obtained the warranty is not complied with; and the Court did not, at that time, see any circumstance by which this case could be taken out of the general rule. The late Lord Chief Justice of this court, in his note book, makes this observation on the case of *Webb v. Thompson*:—"It seems to me that the single question is, Whether the ship departed with convoy? In fact she failed with the fleet. Admiral Christian distinguished accurately between ships under protection of the fleet and ships under convoy. All friends are protected while they are within reach of protection; but ships under convoy are, according to him, ships under control who can be spoken to in a language which they understand. They control them—would fire at them, if they misbehave. The fact settled that it would raise the premium, would decide. It may make a difference in the premium, whether the ship be under protection without control, or under protection and control. It is necessary to inquire, therefore, whether she got sailing instructions (which is the mode of putting herself under convoy), and when? It may seem a hard case to take advantage of a slip, but the nature of the contract is an answer. It is a contract founded in the consideration of premium estimated by the risk." Taking into consideration the way in which the premium in these cases is estimated, can we say that the underwriters have had the full benefit of the undertaking of the assured to depart with convoy, when in fact it was a mere matter of chance whether the *Golden Grove* would, under the circumstances of her actual departure, ever be able to procure sailing orders or not? The present case may indeed be decided without affecting the case of any other ship which failed with that convoy; since, if the captain of the *Golden Grove* had gone on board the frigate at nine o'clock in the morning of the 15th, he might have obtained sailing instructions, and that he did not do so was his neglect. In the case of *Veedon v. Wilmot* sailing instructions were not obtained; but it appears that they were applied for and refused while the convoy was in the *Downs*, the place of rendezvous. The ship, therefore, departed with convoy from the place of rendezvous, in the strictest sense of the word. Indeed, the Court is bound to hold, that where

failing instructions are, under such circumstances, refused by the commander of the convoy, they are so refused for the benefit of the trade which is to be protected by the convoy. It is very usual to refuse to give them till the fleet is out at sea; and we know that *La Motte*, who was hanged for giving intelligence to the enemy, got possession of the failing instructions in consequence of their having been given before the departure of the fleets. It is clear, therefore, that a ship is not bound to obtain failing instructions in the place of rendezvous at all events; but if they can be obtained by due diligence she is bound to obtain them, because it then appears that the convoy appointed by government decides, that under all the circumstances of the case, the place of rendezvous is the place where they ought to be obtained. The principle of law which says that a convoy means a convoy acting under the orders of government, must operate in favour of those who, without any neglect of their own, are not able to obtain failing instructions, because they must obey the orders of that convoy which is supposed most capable, under all the circumstances, of judging for the best. In a late case Lord Kenyon intimated a strong opinion that failing instructions were essential where they could be had (a). Having now stated the exceptions to the general rule, it does not strike me that the present case comes within any of them. (His lordship then went through the affidavits.) It appears to be the constant usage for the commanders of convoys to give failing instructions to all ships which depart under their protection, whenever applied for. But the question in this case is, Whether the warranty, that the *Golden Grove* shall depart with convoy from the place of rendezvous, has been fulfilled? It may be the duty of a commander to give instructions at all times; but that will not vary the contract by which the assured undertakes that the ship shall be ready to receive them at the place of rendezvous. It is stated, in one of the affidavits, to be the practice for the Admiralty to give orders to the commanders of convoys at *Spithead*, to get under weigh 30 hours after the wind has been fair, in order to give time for the ships in the *Dorsets* to come round; and that in case of blowing weather it may not be in the power of the ships which come from the *Dorsets* to obtain failing instructions previous to the convoy having set sail. But if such a case should occur, it will remain to be considered whether it may

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(a) *France v. Kirwan*, Park. Insur. 342. 6.

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not be said that the ship departed with convoy as far as the circumstances of the case and due diligence on the part of the master, would admit. With respect to the case of a convoy being ordered to call off the several ports upon the coast, in order to enable such ships as may be willing to join; it is exactly the case of *Victoria v. Gleeve*, where the ship being ordered by the convoy to leave the port without sailing instructions, was excused on the ground of obedience to the orders of the convoy. In this case the ship did come round time enough to have received her instructions at the place of rendezvous, had the captain used due diligence in applying for them. Not being able, therefore, to represent to myself any principle of law, which could be stated to a jury as a foundation for a verdict in favour of the defendant, I think that the case must be decided on the general rule, which ought not to be infringed on account of any particular hardship which the Defendant may sustain.

Per Curiam.

Postea to the Plaintiff.

(In the HOUSE of LORDS.)

KNIGHT v. HALSEY; in Error.

Hops are, by law, titheable after they are picked from the bind.

And no usage can vary this rule.

No evidence is sufficient to support a real composition, unless it have some reference to a deed of composition.

THIS was an action on the case brought by the Plaintiff in error in the King's Bench against the Defendant in error, as farmer of and entitled to the tithe of hops within the parish of *Farnham* in the county of *Surry*, for not taking away the tithe of hops from a certain close in that parish, whereof the Plaintiff was occupier.

The declaration consisted of two counts. The first stated generally the Plaintiff's occupancy of the close in question, and the Defendant's right to the tithes, and that the latter neglected to take them away after they were duly set out. The second varied from the first, by averring that the tithe was set out "according to the usage and manner of tithing of hops in and throughout the said parish lawfully used."

The cause was tried before *Hotbam* Baron and a special jury at the *Surry* spring assizes, when a verdict was found for the Defendant, under the direction of the learned judge. To this direction a bill of exceptions was tendered, stating that at the trial the counsel for

for the Plaintiff in error gave in evidence :—" That the Plaintiff in error, on the 1st of *August* 1795, was occupier of the close in question, whereon hops were then growing, and that the Defendant in error was the farmer of and entitled to the tithe of such hops; that within the parish and rectory of *Farnham* aforesaid, for above 60 years before the 12th of *July*, in the fourth year of the reign of the late King *James* the Second, when the tithes of hops were not compounded for, the manner of setting out tithes of hops within the said parish was as follows; that is to say, the occupiers, owners, and proprietors of lands within the said parish planted with hops have used to set out every tenth row, whenever hops have been planted in equal rows, and where the same have not been planted in equal rows, every tenth hill of the said hops so growing in the said lands, and thereby to separate and divide the tenth part from the other nine parts of the said hops, and there to leave the same standing with the binds uncut, for the use of the impropiator of the said rectory, or his lessee or farmer for the time being to come upon the said lands, and in a convenient time there to cut the said binds of the said tithe-hops so set out as aforesaid, and to pick the said tithe-hops and carry away the same; That from the time when the occupiers used to set out their tithe in manner aforesaid, till the year 1795, when the Defendant became farmer thereof, (being a period of 100 years,) the tithe of hops was compounded for throughout the parish at the rate of 20 s. by the acre; That the Defendant is entitled to tithe of hops of the close in question; being field land; That in the said year 1795 the said hops so then growing in the said close were planted in unequal rows; That on the 17th day of *August* 1795 the Plaintiff gave the Defendant a notice that he was about to set out the tithe in kind; That in consequence of a notice from the Defendant that he would take his tithe in kind, the tithe thereof was set out accordingly in the said close called *Round Close*, by every tenth hill, leaving the binds uncut, and the tithe marked with a hole dug in the ground, and was fairly set out, and all the hills not bearing hops passed over and not counted; That on the 2d day of *September* following the Plaintiff gave the Defendant notice in writing that the tithe in question was so set out; That on the 20th day of *October* following the Plaintiff gave a notice in writing to the Defendant to take away the said tithe so set out as aforesaid; That the Defendant did not take the same away, but left the tithe so set out standing

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standing with the binds uncut, incumbering the Plaintiff's land for the space of time in the said declaration mentioned; That tithe of hops may be fairly set out by the tenth hill; That such setting out is the most convenient mode and least liable to fraud, and the general manner of manuring hop grounds is to spread the manure over the whole ground, for many hills will be weak, and many will die, and it is impossible to foresee which; That hops will sometimes intermingle on poles on the same hill, but seldom between one hill and another, and where they happen to do so they are easily separated, and without any mischief or injury thereto; That the manner of picking hops in the parish of *Farnham* is not to pick them into measures of a bushel each, but they are picked in the first instance into three sorts, called the bright, the middling, and the brown, of different qualities and values, which three sorts grow upon the same bind; viz. the bright are the finest and best, the middling the next best, and the brown of inferior quality; the difference in value between the bright and the brown is in the proportion of 7*l.* 10*s.* for the bright, and 3*l.* 3*s.* for the brown *per* hundred weight; the hops are thus divided into three sorts in the first picking from the binds into three different bags or baskets at the same time, each containing upon an average eight or ten bushels, and their respective contents are denoted by small round black specks or streaks made on the sides thereof, at different distances; but the bags or baskets are not all of the same measure; That the pickers pick in families, as it is called; viz. in parties, in unequal numbers; some of which families pick much quicker than others, but all cease picking at the same time, either on account of the approaching rain, which would soon spoil the hops when picked, or at meal times; That the average price of picking to be paid by the planter is two-pence *per* bushel to each family of pickers, separately and distinct from the others; That hops, in the parish of *Farnham*, are never measured, the pickers being paid according to the quantity denoted by the specks or streaks aforesaid; but when the bags are full, or at the respective times of giving over work, the hops that are picked are immediately turned over from the bags into a surplice or sheet, and carried from the ground to the oast to be dried; That it would be extremely prejudicial to measure them after picking, because it would render it inconvenient to pick them into three sorts, as aforesaid, and in such case it would employ the pickers an hour and an half extra, the flower of the

hops would be bruised, and the bright hops turned to brown, to the great injury of the planter as well as the tithe owner himself; whereas by setting out the tithe by the hill, with binds uncut, in the manner above mentioned, the tithe owner, as well as the planter, may pick his hops into three sorts, as aforesaid, at his own convenient time, and enjoy all the other conveniencies above enumerated, as well as be enabled to take a tithe of the binds, together with the hops at the time of picking. It also appeared upon the reading of the answer of the Plaintiff in error to a bill filed against him by the Defendant in error in the court of *Chancery*, that the Plaintiff in error had admitted, that he believed it might be true that the introduction and first cultivation of hops in the said parish of *Farnham* and elsewhere in this kingdom, were with reference to what is termed the legal time of memory, modern, and within the time of memory."

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Judgment having been given in the *King's Bench* for the Defendant, in pursuance of the verdict (a), the Plaintiff brought his writ of error, and having annexed the bill of exceptions to the record, and assigned the common errors, submitted that the judgment below was erroneous, and that a *venire facias de novo* should be awarded, for the following among other REASONS:

1. Although the common law does in general prescribe, that there should be an uniform mode of setting out tithe, where no particular mode of setting out is established by custom, yet the custom of a particular place may authorize or require a different mode from that in general prescribed by the common law, if such custom be in itself reasonable. And it has never yet been decided, that the mode of setting out tithe of hops by the tenth measure, as contended for by the Defendant in error, is the only legal mode of setting out such tithe, nor is the particular mode contended for by the Plaintiff in error unreasonable.

2. It has been determined, that the tenth land of grain may be set out standing for the tithe of grain, *Stebbs v. Goodluck, Moor, 913.*; and in *Hild v. Ellis, Hob. 250*, it is stated as coming from the Court, that in many places they set out the tenth acre of wood standing, and so of grass.

(a) This verdict was found upon a second trial; a verdict had before been given for the Plaintiff, and the Court of *King's Bench* thinking that verdict contrary to law, awarded a new trial. For the arguments of Counsel and opinion of the Court upon that occasion, see 7 T. R. 36.

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3. The evidence in the former cause of *Chitty v. Reeves* (a), and in the litigation between the present parties, is uniform to shew, that in the parish of *Farnham* the tithe of hops, when set out, was set out by the tenth row, if equal, or else the tenth hill. How long that custom or usage had actually prevailed, it is not now possible to make out; but if it was not an immemorial custom, (which is not so devoid of foundation as has been generally supposed) it might at least have had its commencement at a time when it was competent to the rector and vicar, with the consent of the patron and ordinary, to make a binding agreement that the tithe should be set out in the way it has been. It was on supposition of some agreement so made, accompanied with the usage, that the court of *Exchequer*, in the suit instituted some time since by the vicar, claiming the tithe of hops planted in fields, adjudged the tithe of hops to belong to the rector, though the vicar took those in the rest of the parish.

4. The evidence adduced by the Plaintiff in error proves two essential things: first, That the tithe of hops may be set out fairly by the tenth row or hill; and, secondly, That the obliging the occupiers of lands in *Farnham* (where hops are, in the picking of them, managed in a peculiar manner,) to set out the tithe of the hops by measure would be difficult, attended with additional expence and great delay, and very injurious to the hops themselves, and materially affect their prices when sold.

5. The prior cases of *Gee v. Perch* (b), *Bliss v. Candler* (c), and *Walton v. Tyers* (d), were totally different from the present; and the defences were in them all so unfounded, and the manner in which the Defendants themselves had before set out their tithes was such, that the Court could not do otherwise than decree an account of the tithes as having been subtracted; and no one of the cases made it necessary for the Court to declare, that, by law, hops were to be picked before the tithes were set out.

J. MANSFIELD.

WILLIAM ADAM.

The Defendant in error submitted, that the directions of the Judge were right and according to law, and that the verdict and judgment ought to be affirmed for the following amongst other REASONS:

(a) Upon the former trial copies of the proceedings in this cause, together with the decree of the Court of *Exchequer* thereon, were read. For the substance of the proceedings and decree, see 7 T. R. 87.

(b) *Vin. Abr. Dismes*, Y. pl. 3. in margin. See also 7 T. R. 90. *in utris*.

(c) See *Vin. Abr.* and 7 T. R. *ubi supra*; also, *Burn, Eccles. Law, Tithes, sect. 7*.

(d) *Burn, Eccles. Law, ubi supra*, and *Probyn, P. C. 99*.

1. That

1. That the common law rule for setting out the tithe of hops, in many instances, hath been determined, and more recently after the most solemn argument, hath been adjudged, and is now clearly settled, that the tithe shall be set out by measure, after the hops are picked from the bind or stem; for that hops are not titheable until after they are picked, at which time, but not before, the tenth part is severable from the other nine parts.

2. To the validity both of a *modus decimandi* being a compensation which must have originated prior to the time of legal memory, and also of a composition real being a compensation which may have originated since that era, but not after the restraining statutes passed in the reign of Queen *Elizabeth*, a consideration or *quid pro quo* is indispensibly necessary. A compensation, be it either ancient or modern, whereby part of the thing is given in lieu of the whole, or whereby a thing is given in a less perfect state than the law enjoins it to be given, unless something be added to make it equal to the value of the real tithe, carries internal evidence to destroy itself, and is considered as being rank, and therefore void. The compensation here contended for by the Plaintiff in error, whether commencing in ancient or modern times, whereby nothing more than the tenth part of the hops before picking is to be given, without adding any thing to make it equal to the greatly advanced value of the real tithe, which the law enjoins, shall be set out after picking, or for the considerable costs the occupier incurs in bringing the article into the more perfect state, and to the benefit of which the tithe-owner is by law entitled—clear of all expence, must be *felo de se*, and as being rank, is void.

3. A custom must be presumed to be as old as the time of legal memory; and, when that presumption is refuted by any circumstance that shews it could not have existed during the whole of that period, the custom is destroyed. No mode of tithing hops can have existed from the time of legal memory, because the cultivation of hops within the kingdom is of a date long subsequent to it, and of this all the courts of *Westminster Hall* have taken judicial notice, and in consequence have uniformly decided against all customs that ever have been attempted to be set up relative to the tithing of hops.

4. The mode of tithing contended for by the Plaintiff in error cannot be supported as a local custom peculiar to the parish of *Furnham*; because, besides the evidence which the records of the judgments of courts of law furnish against its antiquity generally

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throughout the kingdom, it is stated on the bill of exceptions that the introduction and first cultivation of hops within the parish and rectory of *Farnham* is with reference to the time of legal memory, modern, and within the time of memory.

5. Notwithstanding the evidence adduced by the Plaintiff in error, these facts cannot be denied—that the hops on different hills, as well as in different rows, are so unequal both in quantity and quality, that the tenth of either of them bears no proportion to the tenth of the whole produce; that tithing by the hill or row is liable to great frauds; that taking the tithe by either of these modes would in all cases be very inconvenient and in many quite impracticable; whilst, on the other hand, the fairness, convenience and justice of setting out the tithe by measure, after picking, in experience, have been so fully proved, as to render this mode of tithing part of the common law of the land.

• 6. A custom to set out the tithe by the tenth row, if equal, or by the tenth hill, if unequal, ought not to have been permitted to be proved in this cause; because the Plaintiff in error has not, in his declaration, stated, that there was any such custom, or that he had set out his tithes, which are the subject of his complaint, according to any such custom, and therefore the existence of such custom could have no relation to the matter in issue between the parties.

JOHN SHERIDAN,
 WM. CANNON.

This case was argued on *February* the 25th and 27th, by *Macleod* and *Adam* for the Plaintiffs in error, and by the *Attorney General* (a) and *Hall* for the Defendant in error. After the argument, the question put to the judges was, Whether upon the matter set forth in the bill of exceptions, the direction to be given to the Jury ought to have been, to find for the Plaintiff, or for the Defendant?

The Judges desired time to consider of their opinions; and on two subsequent days delivered them *seriatim*, there being a difference upon the Bench. *Rooke J.* was of opinion, that the direction ought to have been in favour of the Plaintiff; and *Chambre Baron*, *Le Blanc J.* *Lawrence J.* *Thompson B.* *Grose J.* *Heath J.* and *Macdonald Ch. B.* held that it was rightly given in favour of the Defendant.

ROOKE J.—The question proposed by your Lordships is, Whether, upon the matters set forth in the bill of exceptions, the direc-

(a) Sir John Mitford.

tion to be given to the Jury ought to have been, to find for the Plaintiff, or for the Defendant?

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According to my view of this case, the answer to this question must depend on the opinion the Jury would have formed as to the facts here stated.—If the Jury were satisfied that the facts stated in the bill of exceptions were sufficiently proved, my opinion is, that they ought to have found a verdict for the Defendant.

Though I am so unfortunate as to differ from the Lord Chief Baron and all my brethren on this question, yet I flatter myself that we do not materially differ as to first principles, but rather as to the application of them. I agree that, where no practice has prevailed to the contrary, the general law of tithing hops is by the measure; that a strict legal custom must be immemorial; that according to the doctrine laid down in our books, hops are of modern cultivation, as an article of husbandry, and cannot be the subject of a strict legal custom. But, I think,

1st, That the general law of tithing hops has been established with a cautious regard to the usage of such particular parishes wherein a reasonable and convenient usage has obtained.

2dly, That such restriction on the general law is not illegal, nor contrary to the principles of tithe-law.

3dly. That the usage set up by this parish of *Farnham* may be supported without violating any legal principle.

1. As to the general law of tithing hops.

The wild hop is probably an indigenous plant: but though indigenous, yet it first became an article of cultivation within time of legal memory, it seems agreed, that no customary usage as to tithing it can be supported against the general rule of law. In the case of *Crouch v. Ridsen* (as reported in 1 *Sid.* 443.) the Court deny that there can be a *modus*, by way of prescription, to pay so much for tithe-hops, and say, they will take notice that hops are not so ancient, but were used in beer only of late times, notwithstanding the records cited by Lord *Coke* to the contrary. In justice to Lord *Coke's* memory it should be observed, that the passage alluded to in Lord *Coke's* work is misrepresented by the reporter. Lord *Coke* cites 12 *Ed.* 4. c. 8. as to those who had purchased licences patent to be correctors of ale, beer, wine, &c.; and has this note in the margin of the 4 *Inst.* 262. “*Nota*, By this appeareth that beer is not of such late time as some suppose. See also *Rot. Parl.* 4 *H.* 4. No. 53. Beer and ale mentioned to be then in *Calice*. Beer is a *Saxon* Word, *Bier*; and Beer

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“ is within the word *Cervisia* in the ancient statutes. For it is
 “ but as the putting a new button to an old coat, *viz.* hops to
 “ malt and water, to make it continue the longer.” According
 to this passage, the putting hops to beer was considered by Lord
Coke as of modern practice in his time: whereas the reporter
 represents him as saying the contrary. The same case (*Crouch v.*
Rifden) is reported 1 *Ventr.* 61. and the reporter makes the Court
 say, “ there could be no such composition time out of mind; hops
 not being known in *England* till Queen *Elizabeth*’s time; for then
 they were first brought out of *Holland*; though beer is mentioned
 in a stat. of *H. 4.*” This account of the introduction of hops is cer-
 tainly inaccurate, for we find, that hops were known before
 1562; for they had attracted the notice and encouragement of the
 legislature at that time, as appears by 5 & 6 *Ed. 6. c. 5.*

We have then the authority of Lord *Coke*, that the use of hops
 in beer is of modern introduction: and supported by the autho-
 rity of this passage in 4 *Inst.*, and of these very inaccurate reports
 of the case of *Crouch v. Rifden*, the modern authorities uniformly
 consider it as settled, that hops were first cultivated within time of
 legal memory, and that they cannot be the subject of immemorial
 custom. Yet I cannot but observe, that as the hop is probably
 indigenous, and as (if the reporters are correct) the Court were
 certainly not aware how long the hop had been an article of cul-
 tivation, the judicial notice which they took of its modern
 introduction seems to have a slight foundation. To ascertain
 satisfactorily the law as to tithing hops, it may not be amiss to
 state, in historical order, the several cases which are reported on
 this subject. The earliest case we have in our books, respecting
 hops, is cited in *Hutton*, 78., it was 3 *Jac. 1.* between *Pot-*
man. Knt. and another. The question was as to the nature of the
 tithe, and adjudged to be a great tithe: but as for hops in gardens
 and orchards, they were adjudged to the vicar as *minutæ decimæ*.
 In *Hil. 14 Jac. 1. B. R.* (1616), it was said by *Hitcham*, Serjt.
 and agreed by *Mountacute* (who was then Ch. Justice), that a man
 may set forth a tenth part of hops for tithes, *before they are dried*,
 1 *R. Abr.* 644. tit. *Dismes* (Y), pl. 3. between *Barham* and *Goose*.
 From this *dictum* of Serjt. *Hitcham*, as to setting forth the tithe be-
 fore they are dried, it seems pretty clear, that the setting forth the
 tithe by measure was practised in some countries at that time;
 though we know not how generally. But, on the other hand,
 if the law of tithing hops by the tenth measure after picking was
 the general rule from the time they were first cultivated, it seems

difficult to say by what analogy the tithe of the mere flower of the hops was ever considered as a *great tithe*.

Hops were an article of general cultivation before the reign of *Car. 1.*; for in the case of *Uvedale v. Tindall, Hutton, 77. 1 Car. 1.* the Court say, "In some countries a great part of the land within the parish is sown with hemp or hops." In 1629, *4 Car. 1. Trin. B. C. Alfrey v. Mills*, the Court held that where there was a *modus* for a garden, hops growing in a garden were within the *modus*, provided that they did not grow in any addition to the garden. From these cases we may safely infer, that hops were an article of general cultivation so early as *4 Car. 1.* and that there had been several litigations as to the nature of the tithe, whether great or small, and as to the claiming of a *modus decimandi*. In the case of *Legard v. Elcock, (1666,) Pasch. 18 Car. 2. B. R.* on a question as to the mode of setting forth tithe of corn the Court say, (according to the report of *2 Keble, 36.*) that the custom of *England* is, to set forth in sheaves, but each county hath several ways, as of hops, which, by *Keeling*, (then Ch. J. of *B. R.*) is a small tithe, and payable by the pole. What Lord Ch. J. *Keeling* is here reported to have said as to the nature of the tithe is now considered as law; for, notwithstanding the case cited in *Hutton, 78.* hops are now held to be a small tithe: according to the report of the same case, *1 Sid. 283.* under the name of *Ledger v. Langley, Trecyflen J.* said, that it has been questioned, and is not now known, how the tithe of hops shall be set out, *scil.* by the tenth pole or by measure. And in the case of *Crouch v. Risden, Hil. 21 & 22 Car. 2. B. R. (1670,) 1 Sid. 443.* the reporter adds, note *per Trecyflen J.* (who lived in *Kent*); It is a question at this day how hops shall be tithed, Whether by the hill, or by the pole, or by the bushel? I have been the more particular in deducing the cases thus in chronological order, because I think it must appear clearly from them, that from the first cultivation of hops, which was before A. D. 1551, till after 1670, a period of above 120 years, though hops had for a long course of time been an article of general cultivation, no certain mode of setting forth the tithe of them had been established; consequently, we may presume that different modes prevailed in different parishes, and perhaps in different parts of the same parish, and some particular modes might have prevailed in particular places for a very long course of time, even from the first cultivation of the hop. The tithe owner received his tenth and had a right to his tithe in kind; no *modus decimandi* was allowed; but

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as to the *modus exponendi*, or mode of setting it forth, various practices prevailed. This distinction between the *modus decimandi*, and the *modus exponendi*, was taken by *Lindley*, who was counsel against the prohibition in the case of *Ledger v. Langley*, and seems to me to be a sound distinction. In *Hob. 107. Wilson v. The Bishop of Carlisle*, 13 Jac. on a question, Whether a custom was good to tithe wool truly without view of the parson? Lord *Hobart* holds it bad, and says, "The law provides that you have your right, and therefore that your means be such as is likely to produce it." Here is a distinction between the right and the means whereby that right may be obtained; *i. e.* between the right to the tenth and the means whereby that tenth may be ascertained and set forth. And the doctrine laid down by the Court in the case of *Hyde v. Ellis* is to the same effect; that tithe naturally is but the tenth of the revenue of my ground, not of my labour and industry, where it may be divided. If, therefore, a mode could be devised by which the tithe owner may receive the tenth of the produce of the hop grounds, and the same may be conveniently set forth, I feel no absolute necessity for requiring the former to set it forth by measure. The *modus exponendi* may vary, provided the tenth is received in kind.

The law of tithing hops being thus unsettled till so late a period, let us see when the law was settled, and what law was settled on the subject. From the *dictum* of *Hitcham*, Serjt. 1616, till the case of *Chitty v. Reeve*, 1687, I am not aware of any decision or even of any *dictum* in our books, which ascertains or even suggests how the manner of setting forth this tithe is settled. That case states how the law was settled, and is cited by Mr. *Ward* in the case of *Bake v. Sprackling*, *Scacc.* 1717, (*Bunbury*, 20) as having settled the law on the subject; *viz.* that tithes of hops are not to be paid till after they are picked and before they are dried, every tenth measure. *Bunbury* in a note says, that the tithing of hops was settled in the case of *Bliss v. Chandler*, 1720.: but in this he is inaccurate; for in reading the decree in *Chitty v. Reeve*, no one can doubt that the general law was there ascertained, and that subsequent cases have only served to confirm the law there settled, without impeaching any thing there laid down; nor has that case ever been impeached till the present difficulty was started. It seems, therefore, of great importance to the decision of the present question, to examine accurately what was the law laid down by the Court of *Exchequer* in that case. The Court were fully apprised

prised of the terms of this custom, of the mischiefs of cutting the binds, and not tithing by measure after picking, and that by the law of the land, tithe hops ought to be paid in kind; viz. *the tenth part of the whole after picking*: yet the Court declares in favour of the usage, and makes a decree to the following effect:

“ It fully appearing to the Court that the custom usage or practice
 “ of paying tithe hops in the parish of *Farnham* for above 60
 “ years past hath been that the impropiator hath had the tenth
 “ row when equal, or else the tenth hill, that the same hath been
 “ left standing with the hop binds uncut, that the impropiator
 “ hath always had convenient time to come and cut the binds
 “ and to pick the hops on the ground; the Court was of opinion
 “ and declared the said custom usage and practice to be reasonable
 “ and fitting to be observed, and the Court declared that in case
 “ *there was not any such usage*, the tithe of hops ought to be paid
 “ in kind, viz. *the tenth part of the whole after picking*.” Thus
 in the very first case in which we have any account that the law
 of tithing hops is settled, we have also an account of an usage al-
 lowed to stand against it. Words cannot express more plainly that
 according to the opinion of the Court of *Exchequer*, an usage or
 practice if convenient and fitting to be observed, ought to be esta-
 blished against the common law right which was now declared to
 be, by the tenth of the whole after picking. It was objected in
 the argument that this usage was set up by the executor of a
 lessee for a short term, who could not bind the right of his land-
 lord; but let the usage be set up by whom it might, it was dis-
 puted by the occupier; and if the Court had thought that no
 usage could stand against the general law of tithing hops as it
 was then held to have been settled, they were bound to have de-
 clared against the usage.

When the law was settled we do not precisely know, but this
 case declared that it was settled and how it was settled. With
 respect to the *modus exponendi* thus established, I cannot but make
 this observation, that it seems to have been adopted on a principle
 of convenience only; for it certainly is not a regular legitimate
 mode of tithing; it gives the tithe-owner the flower of the hop
 only, and it withholds from him the stalk; though, according to
 the course of husbandry as to hops, the bind is first severed, and
 then the hop is picked. By a sort of compromise for convenience
 sake, it takes from him the stalk, to which he has a sort of legiti-
 mate right from the moment of severance, and gives him the
 benefit of the planter's labour and expence in picking, to which,

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according to the principle laid down in *Hob.* 250. he has no right at all.

I am aware that, since the hop has been decided to be a small tithe, attempts have been made to put it, by analogy, on the same footing as the tithe of fruit. The bind is likened to the branch of a fruit tree; and it is said, that the parson is only entitled to the fruit, and that as the farmer may not pluck off a bough and give it to the parson and bid him gather the fruit, so neither ought the farmer to cut the bind and leave the parson to pluck the hop.— This may be similitude; for there are some faint traits of resemblance, but it certainly is not *analogy*; because it is defective as to the main circumstance, the common course of husbandry.

The constant course of husbandry is to sever the bind; but by no course of husbandry is it usual to cut the branches off the fruit trees. Should a farmer cut his binds and refuse to pick his hops, I think it probable that our courts of law would hold this to be so far a severance as to intitle the tithe-owner to something, if he thought it worth his while to claim it; or should it happen that, by any course of husbandry, the binds were severed on one day and not picked till the next, and should the tithe-owner die in the intermediate time, I think it probable our Courts would consider this as a severance, and give the tithe to the executor, because *the severance is according to the course of husbandry*. In short, I consider this *modus exponendi* as peculiar, as not reconcilable by analogy to any prior mode of setting forth, as founded solely on the peculiar nature of the subject matter, and as settled on a principle of convenience only; and if the Court of *Exchequer*, proceeding upon this principle, has also held, that where a convenient usage has long prevailed in a particular parish, it shall be established against the general principle of convenience, where no usage is set up: I do not feel myself warranted, or disposed to say, that the Court has done wrong. I consider the Court of *Exchequer* as proceeding with great and laudable caution in settling this point of law, aware of the great length of time during which the law had been unsettled, and aware of the possibility that particular practices might have prevailed in particular parishes, which were reasonable and fitting to be observed; and having one instance of that kind before them they declare that such usage ought to be observed, but that where there is no such usage the general rule must prevail. Since the case of *Chitty v. Reeve*, this point has never come directly in question till the present case. Several cases have been litigated as to the tithe of hops; in none of which the doctrine laid down

in *Chitty v. Reeve* has been denied; but in some of which it has been affirmed. In the two cases of *Gee v. Percb*, 1698 and 1704, 1 *Wood*, 386. 439. (a) the Court declares, that hops ought to be picked and gathered from the bind before they are tithed. This had been already settled in the case of *Chitty v. Reeve*, and was no new doctrine; the custom set up in the first of these cases, in 1698, was that 10s. an acre should be paid for the tithe of hops; such a custom was void according to the principles laid down in *Crouch v. Risden*, 1 *Sid.* 443.; but this custom respected a modus in discharging of tithe, not the manner of setting it forth. The case of *Bliss v. Chandler*, 1720, 2 *Wood*, 148. respected the manner of setting forth the tithe of hops: but the Defendant set up no custom; he had paid tithe of early hops by the bushel, after they were picked, and the remainder by stripping the binds from every tenth pole or hill, and leaving them on the ground for the Plaintiff to pick. The Court say, tithe must be paid by every tenth *bushel* of the whole after they are picked. Here the Defendant had set forth his tithe in two different ways, but alleged no custom in support of either; the Court, therefore, did not decide any point as to custom, but declared the general law. The next case that is reported on this subject is the case of *Sneyd v. Unwin*, January, 1740, 2 *Wood*, 403. —The rector of *Heddingham Sible* in *Essex*, claimed the tithe of hop, by receiving, on the hop grounds where the same arise, the tenth measure or weight after they are plucked from the stalk, and before they are dried and packed. The Defendant set up *an ancient usage*, whereby the rectors are obliged to accept their tithe hops by the tenth pole or hill, after the vines are severed from the ground and stripped off the poles; and that the said rectors were, and the Plaintiff was obliged, to pick all his tithe hops. Here was an ancient usage set up less favourable to the rector than the usage set up in the case at bar; because it was to sever the binds from the ground and to strip them off the poles; yet the Court did not pronounce against it *a priori*, and say, it was technically impossible that any usage could be supported against the established right. The Court was very deliberate in its proceedings. It heard the counsel, it read the proofs, it read the several decrees in *Chitty v. Reeve*, in the two cases of *Gee v. Percb*, and in the case of *Bliss v. Chandler*, and with this *full information* before them, it directed an issue to be tried by a special jury, Whether, by the usage in the parish of *Heddingham Sible*, hops are to be tithed before they are picked from the stalk? This case has great weight with me: the

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Court had the case of *Chitty v. Reeve* before them, as well as the other cases; they were well apprised of the general law, and yet they directed this issue. Must not a plain man infer from hence, that, according to the opinion of that court, an usage to tithe hops before they are picked from the stalk might, under some circumstances, be supported against the general rule?

It is observable that the Court did not direct an issue on the particular custom, set up by the Defendant, but a more general issue on usage at large. Had they not thought that, according to the case of *Chitty v. Reeve*, usage might stand against the general rule, they surely would not have directed such an issue. And if any usage whatever could be supported against the law then generally established, then this case is an additional authority to shew that the technical objection made to the usage now set up, ought not to prevail. On the trial of this issue the jury found a verdict *against the usage*. In the year 1752 the rector filed his bill against the son of the former Defendant *Unwin*; the Defendant answered to the same effect, as to the custom of tithing hops as his father had done in the former cause; the Court declared that the method of tithing hops insisted on by the Defendant, is not the legal method of tithing hops; but that they ought to be picked and gathered from the binds or stalks before they are titheable, 2 *Wood*, 478. There can be no doubt that this decree was right; the question as to usage had been tried, and the jury had found against it, and there being no usage the method set up by the Defendant was not the legal method. The next and ~~last~~ case in point on the subject is, the case of *Walton v. Tyers*, in *Scacc.* February 1753, and ultimately decided in this house (a). This case is relied on as having finally settled the point as to the mode of tithing hops. I do not understand this case to have settled any point which was not well known before. From the case of *Chitty v. Reeve* the decisions had been uniform, that the tithe of hops is to be set out after they are picked, and before they are dried, unless in parishes where there had been an usage to the contrary: on the point of usage there were two cases which seemed very strongly to allow its validity; and on this point the case of *Walton v. Tyers* decides nothing. According to the account of this case, in 2 *Wood*, 484, the Defendant, in his answer, disputed the general rule of law, and insisted, that the tithe-hops ought not, by law, to be set out *after they are* picked from the bind or stem, and he *denied that there was any custom*, in either of the *parishes*, for setting out the

(a) *Vid. 5 Bro. P. C. 99. 2 Burn's Ecc. Law, 450.*

tithe of hops. So that, though the court decides nothing on the question of custom, it seems as if those who advised the parties in their pleadings thought that custom or usage might be material in the case.

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On these authorities, and for these reasons, I am of opinion, that according to the law established for tithing hops, the general rule that hops are to be tithed by measure after they are picked, and before they are dried, has not been established so pre-emptorily and strictly as to destroy or to disturb such reasonable and convenient usages as have prevailed uninterrupted, and for a long course of time, in particular places; but has been established with due caution and circumspection, and subject to such usages.

My second proposition is, that the law settled as above stated, with a restriction as to local usages, is not contrary to the principles of tithe-law. And so far is it from being contrary to these principles, that it is in strict analogy with them. The manner of setting out the tithe of every titheable article has been, for the most part, long known and settled; yet there are many articles which local usage regulates the mode of setting forth. In *Hob. 250. Hide v. Ellis*, 16 *Jac.* it is said, "In divers places they fell out the tenth acre of wood standing, so of grass." This shews at least the opinion of the Court, that the *modus exponendi* may be regulated by the custom of the place. In 2 *Keble*, 36. *P. 18 Car. 2. Legard v. Elcocke*, the Court are reported to have said, on a question of tithe-corn, "The custom of *England* is, to set forth in sheaves; but each country hath several ways, as of hops." In *Holberch v. Whadcocke*, *P. 13 Car. 2. Scacc. Hardr. 184.* it is said, agistment tithes for barren cattle are due *de communi jure*, according to the value of the land, after the rate of 2*s.* in the pound; for that they cannot be otherwise valued, or accounted for, because the profits of the land for which they are paid are perceived by the mouths of beasts: but, by custom, or prescription, they may be paid in other manner, as, by the acre, or for all manner of cattle barren, and for the plough and pail. So in *Ilicks v. Woodson*, *M. 6 W. & M. B. R.* as reported in *Skinner*, 560. *Holt Ch. J.* says, Tithes for barren cattle are due *de communi jure*, and 2*s.* in the pound is the usual tithe of common right, but that there are divers customary manners of tithing for them.

In addition to these authorities, the law as to tithing milk is a complete proof that the custom of the place may regulate the mode of setting forth tithe. The common law right has been

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finally settled by very modern cases; but it has been settled with a due regard to all the local customs which have prevailed in different parishes. The case of *Stebbs v. Goodluck, Moor*, 913. 1 *Leon*. 99. P. 30. *Eliz. B. R.* appears to me very material to this point. The custom there set up was, that the parson shall have for his tithe the tenth land sown with any manner of corn, and he shall begin his reckoning always at the first land which is next the church. The parson shewed, that the Defendant, by fraud and covin, sowed every tenth land, which belonged to the parson, very ill, and with small quantity of corn, and did not dung or manure it as he did the other nine parts, by reason whereof the other nine yielded each eight cocks, and the tenth yielded but three cocks. The parson libelled in the Spiritual Court, and confessed the custom; but for abusing the custom prayed the tithe in kind: the Defendant prayed a prohibition, and the parson afterwards a consultation. And the opinion of *Wray Ch. J.* was, that the custom was against common reason, and so void, but if it be a good custom then the parson shall have his action on the case. This is the report in 1 *Leon*. The case is also reported in *Moor*, 913. who says, that a prohibition was awarded, notwithstanding the covin, for the fraud may be remedied in an action on the case at common law. Whether a consultation was afterwards granted does not appear from either report: but, it is said, in argument, by counsel, 2 *P. Wms.* 569. (*Chapman v. Monson, Hil. 1729.*) on what authority I know not, that a consultation was granted on *Wray Ch. J.*'s opinion. This case furnishes observations very applicable to the case at bar.

1st, *Wray Ch. J.* declared his opinion immediately on the argument, that the custom, though confessed and set up, as in the case of *Chitty v. Reeve*, by the parson, was against reason, and so void. He did not (as the Court of *Exchequer* are supposed to have done in the case of *Chitty v. Reeve*) suffer a custom to be set up under the sanction of the Court, which he thought to be void: but he declared his opinion directly; and I am disposed to think with equal favour of the Court of *Exchequer* in 1687, that had they thought no usage could prevail against the general right, they would have declared so, notwithstanding the usage was confessed and set up by the impropiator. 2dly, Supposing *Wray Ch. J.*'s opinion to have been the opinion of the whole Court, it does not affirm that a custom to tithe the tenth part of corn growing upon the land is bad; but it affirms this,

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and this only, that a custom to tithe the tenth land of corn, beginning at one certain land, is void; because it is open to the fraud of manuring and sowing the parson's land worse than the others. And, according to this distinction, the law is laid down, in *Watson's Clergyman's Law*, c. 49. page 549. "If the custom of the place be to measure forth to the parson the tenth part of the corn standing, this manner of tithing is, I conceive, to be observed, and the parson must sit down by it." Mr. *Bobun*, in his *Law of Tithes*, chap. 2. says the same, and adds, it seems to me, such a custom or prescription may have a reasonable foundation on this supposal, that the field where those lands or ridges lay, was originally a common waste field belonging to the township; and that, on agreement of the parishioners to turn it into arable, they consented to allot the tenth land or ridge by them sown to the parson, but he to reap it. If there be any weight in this observation by Mr. *Bobun*, it applies very strongly to the case now before the house; for *pari ratione* it might be agreed in this parish of *Farnham*, that the parishioners should turn their lands into hop grounds, and consent to allot the tenth row or hill to the parson, and he to sever and pick the hops, and to have convenient time for this purpose. It seems not settled at this day what shall be sufficient evidence to warrant a jury to find such an agreement; but if a jury may presume a grant or agreement from usage only, then they may presume that in this parish. An agreement may have been made before the restraining stat. of 13 *Eliz.* c. 10, and by consent of the proper parties, namely, the parson, patron, and ordinary. For we know that hops were an article of husbandry before the 5th and 6th of *E. 6.* (35 years before); and *Hob.* 297. says, that a grant of a parson, patron, and ordinary, is good without any recompense. There is a report 2 *Leon.* 70. of an anonymous case, *Hil.* 24 *Eliz.* B. C. which certainly countenances this doctrine of tithing by the tenth land. "By the civil law the parson ought to have his tithe by the tenth ridge, and in a great field there was corn upon the arable, and grass upon the head lands, and in a suit for tithe-hay and rakings of the corn, the Defendant did prescribe to pay the tenth shock of corn for all the corn, hay, and rakings of the corn: and in the end all the justices agreed, that by the civil law the tenth ridge is due for tithe-corn; therefore, for the reaping, binding, and shocking, it is a reasonable prescription, that the party shall have the hay on the head

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lands in recompense of the said other things; and the hay upon the head lands is but of little value." Upon the whole, this case of *Stebbs v. Goodluck*, sifted and commented upon as it has been by our text-writers, is, to my understanding, a very considerable authority to prove, not only that local custom may regulate the mode of setting forth tithe, but also, that according to professional tradition, tithe may be set forth while standing, and before it is severed; though it is true, as was observed by Mr. *Attorney General*, that there is no adjudged case in which it is declared, that tithe may or may not be so set forth. The answer given to all these cases is, that they respect articles which have been in use time out of memory, and which, therefore, may be the subject of a legal custom. This answer is merely technical: for we all know, that in point of fact, the evidence of usage seldom goes back so far as two centuries; but if it goes back for a considerable length of time, and the article which it respects has been of immemorial cultivation, a presumption attaches, that the usage has been immemorial. In the case of hops, no such presumption can attach, because the hop is of modern cultivation. But it seems to me, that Courts of law are at liberty to decide by analogy, in this as in other cases which arise on new subjects: and if they observe that local usage has been respected as to the mode of setting forth those tithes which may be the subject of custom, they may also respect it when they declare a new system of law on a subject introduced within time of legal memory. This, I think, our predecessors have done on the subject of hops; they have said that local usage, if convenient, and of long continuance, shall be respected; and that where there has been no such usage, the tithe shall be set out by the measure, after picking.

It appears to me to be fallacious to state the present question to be—Whether modern usage can be set up against the established law of *England*? If that were the question, I should answer without hesitation, that it could not; but I consider the question at present to be—Whether the Courts of law have not, when they first settled the general practice as to tithing hops, settled it with a due deference to particular local usages: and whether they might not legally do so? They were aware that the usage, though not immemorial, might be coeval with the cultivation of the article; that in particular places fit and convenient usages might have prevailed: that the general rule declared by them was anomalous, illegitimate,

illegitimate, and supportable upon principles of conscience only; and, therefore, they would not set it up rigorously and strictly, to disturb the peace of parishes, and to destroy all established usage; but they laid down their rule subject to such a reasonable usage as had obtained in particular places. Now if convenient usage is first established, and the law is settled afterwards upon a principle of convenience, why may not the courts settle the law subject to such usage? Are we to be told that the law is drawn from the eternal and immutable principles of reason and justice; and that, though it was settled as to some particular point only yesterday, it must necessarily have relation back to the first constitution of things, and destroy every usage to the contrary? This doctrine, rigidly pursued, would destroy all local custom; for the custom being in derogation of the law, ought then to have been abolished when the law was settled. But the Courts have declared that both being beyond time of memory, custom, if reasonable, may stand against the common law, though it is in derogation of those immutable principles on which the common law is founded. I see no reason why our Courts may not follow a similar rule by analogy, and where they know, or have reason to believe, that convenient local usages have prevailed for above a century before the law was settled; why they may not lay down this rule with a due regard to the preservation of those usages. If they have done so, (and I think they have in the present instance,) I incline to support the decisions.

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I do not hold myself bound to say, that my predecessors were in an error in 1687 and 1740, and that though morally right they were technically wrong, or to set parishes on a new course of tithing, and, for aught I know, on a new course of husbandry as to picking their hops, when I have evidence before me that they have proceeded in a particular course peaceably and quietly for near two hundred years, under a sanction of a decree of the Court of *Exchequer*. The rule of *Stare decisis* is as justly applicable to private parties as it is to general principles, where the decision can be reasonably ascertained and supported. And on the present question, I find no principle and no decision, ancient or modern, which calls on me to declare, that the decrees of 1687 and 1740 were against law.

My 3d proposition is—That the usage set up in this case may be supported without violating any legal principle. If the opinion is well founded, that the general law of setting forth the tithe of

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hops has been settled with the exception as to convenient and established local usages, and that it is no violation of legal principles to have settled it so; the only doubt on this proposition will be, Whether there is any thing illegal in the usage here specially set up? Where the subject-matter is capable of custom, and where usage can be ascertained, Courts of law have been even astute to support it.

The case of *Scory v. Baber*, P. 34 *Eliz. Gro. Eliz.* 276. was a prohibition against the proprietor of the church of *South Kikrby*, who sued for tithes of hay. It was surmised that time out of mind the owners of these lands had found straw for the body of the church, in *discharge of all tithes of hay*; *Coke* moved that this is no discharge; for the parson was not chargeable with it, nor had any benefit by it; and of that opinion was the whole Court; but if he had alleged that he gave the straw to the parson, and he bestowed it in the body of the church, or that the *parson had a seat in the body of the church*, it had been otherwise. In short, any compensation, however small, may be sufficient to support a discharge from payment of *tithe in kind*; and the smaller the compensation (if it is pecuniary) the greater is the probability of its antiquity. It was said in the argument that there should be some mutuality between the parties; some benefit to the one and some charge to the other: the compensation need not be equal, but something should be given, *however small*. This rule holds as to a modus in discharge of tithes in kind; but I do not find that it holds as to the *modus exponendi*. Tithes may, according to the authorities and cases above referred to, be set forth according to the custom of the country, without a particular compensation for not setting them out according to the general rule of law. The usage set up in the present case is stated at length in the bill of exceptions. Divers objections have been suggested to it at the bar: 1st, That it gives no recompence, not even the binds. I answer, 1st, That no recompence is necessary in a usage merely as to the setting forth of tithe. 2d, That as the custom is here stated, I think the binds left for the parson to cut do pass to him: the farmer does not state that they were to be left for him; I think he may choose whether he will carry them away. And as to the binds being a recompence, it is well known that experiments have been lately made to turn them into a pulp which may make paper; though they have not yet succeeded.

The 2d objection is, That there is no severance : I answer, that there is a severance by the farmer of his share, so as to ascertain when the tithe is due ; the severance of the tithe in kind is merely for the benefit of the tithe-owner, and if he chooses to renounce this benefit for his own convenience, he may lawfully do it.

The 3d objection is, That it will not give a complete tithe ; for, suppose there should be only nine hills, the parson would be entitled to nothing. I answer, That I do not find the usage so stated. I should rather suppose, that if there were only nine hills, the usage would not attach : but the supposition of only nine hills is rather a matter of fancy than a case likely to happen ; and perhaps it may be fair to answer, that such a small circumstance as this is beneath the regard of the law in a question of parochial usage. *De minimis non curat lex.*

The 4th objection is, That it is open to fraud ; that the farmer may manure some hills better than others ; that in setting out his tithe he may begin to reckon from some particular hill so as to throw all the unproductive hills into the parson's tithe. I answer, 1st, That this is not like the case of the custom condemned by *Wray Ch. Jus.* where the farmer was necessarily to begin at a particular ground, and might consequently neglect to manure every tenth ground, and know for a certainty that it would be the lot of the tithe-owner : here the farmer has no customary right to begin at a particular hill ; he is to begin as in a corn or hay field, at such hill or sheaf, or hay-cock as may enable him to set forth the tithe fairly and equally ; he must set it forth openly, so that it may be viewed and objected to by the tithe-owner or his agent ; and if it be not fairly set forth, the tithe-owner has various remedies to enforce his right. But further, the supposition that the farmer can manure and prepare his hop-ground in such a manner as to enable him to count the tenth hill or row so unfairly as to make all the blasted or blighted, or unproductive parcels fall to the parson's share is much too refined, and is directly contrary to the facts stated in the bill of exceptions. " Many hills may be weak " and many die, *and it is impossible to foresee which.*" The bill of exceptions also states, that the tithe of hops may be fairly set out by the tenth hill, and that such setting out is the most convenient mode, and least liable to fraud. There is also the opinion of the Court of *Exchequer*, in 1687, that the custom, usage, and practice is reasonable and fitting to be observed. Under these circumstances I do not feel myself warranted to pronounce that

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this usage, which had prevailed, and in which all parties had acquiesced for above sixty years before 1687, and which has surely influenced all parties in the compositions they have made for above a century past, is in itself illegal, and could not be supported if it respected a subject of immemorial existence. I do not presume to impeach the wisdom or policy of the general law laid down as to tithing hops. It is probably the most politic and convenient that could be adopted; and the present litigation shews that (in the opinion of the tithe-owner of this parish at least) it is more profitable for the church than the usage which the parishioners of *Farnham* now set up. But I think it is anomalous and founded on the principle of convenience and policy only: and I think too, that it is not wholly void of inconvenience, nor likely to be unproductive of disputes, where there is no composition. For the farmer is not bound to provide measures or vessels to hold the tithe after it is ascertained; consequently the tithe-owner must have agents attending in every ground, and in various parts of extensive grounds, while the hops are picking, who must be ready to receive the tithe immediately as it is set forth. Such rights on each side may give rise to great dispute, where the tythe is taken in kind, and the parties cannot agree on a composition. The usage here set up may have inconveniences also; but they are not of such a nature as to satisfy me that the Court of *Exchequer* did wrong when in 1687 they declared the usage to be reasonable and fitting to be observed: the conveniences and inconveniences of the usage may be thus stated: The loss to the tithe-owner is—the benefit and expence of picking the tithe. On the other hand—he takes his own reasonable time to pick; he saves the expence and difficulty of procuring a number of agents to attend in various places; he picks and sorts as he pleases; he has the stalks if ever they should prove valuable. The farmer too has some disadvantage:—his ground may be incumbered; his hop-poles are used and exposed for a reasonable time beyond his own harvest.

Upon the whole I am of opinion, That the law of tithing hops has been settled not generally, but with an exception as to reasonable and ancient usage respecting the mode of setting it forth; that the Courts might so settle the law, and allow such exception, without violating any sound principle of the law of *England*; and that this usage, set up by the Plaintiff in error in the bill of exceptions, (if the jury had been of opinion that the facts there stated were sufficiently proved,) is not contrary to any principle of tithe-law.

Some apology may not be improper for having occasioned so much trouble to the House and to the Judges, for thus differing in opinion from those whose judgment I feel myself both disposed and bound to respect. The best apology I can make is, to say, that as it is my opinion, I am bound by my oath to avow it, and by my duty to the public to state the grounds on which I have formed it: and it is a great satisfaction to me to know that, if I am in an error, this House will take care that my error shall work no injury to the parties nor to the established law of the country.

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The course of argument pursued by the learned judges who thought the direction right, was to the following effect:

The consideration of this question resolves itself into three heads:—First, What is the general rule of law with respect to setting out the tithe of hops, independant of particular usage or practice in particular places? If that rule should be found essentially to vary from the course which has been pursued in the parish of *Farnham*, and to which the Plaintiff has conformed: then, secondly, Whether the usage stated in the bill of exceptions, however convenient and applicable to any modern improved method of cultivating and preparing the hop for market, can overturn the general rule, or be supported upon any legal principles? and, thirdly, Whether sufficient matter was given in evidence, whereon to ground a sound presumption of a real composition having taken place with respect to this article of annual increase?

That this article became a subject of cultivation long posterior to the time of legal memory is a fact noticed in a variety of cases agitated more than a century ago. It seems true, indeed, that the Courts of justice were not called upon to declare the particular mode in which hops were titheable until a considerable time after their introduction into this country; though, when the point did arise, there appears to have been little difficulty in deciding it. All titheable matters, when newly introduced, are classed among others to which they bear an obvious resemblance; and are accordingly deemed a great or a small tithe, and are required to be severed and set out in a similar manner with those articles which they resemble. Such has been the case with woad, saffron, tobacco, and other such titheable matters; such would have been the case with madder, had not the legislature established a temporary composition, which expired in 1786; such has also been the case with all artificial grasses. The right of the parson to his tithe

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in kind accrues on the act of severance; his right to take the tithe accrues when the titheable matter, after severance, is in the earliest stage of the course of husbandry applicable to it, in which the tenth part may be visibly distinguished from the other nine. What shall be deemed a severance must depend upon the nature of the matter to be severed. But no other mode of severance in the case of titheable matters of annual increase has been judicially recognized, except that of severance from the soil, and severance from the parent stem. The same principle that requires fruit and seeds to be set out, after they are gathered or collected, by measure or weight, must require hops to be tithed in the same manner, after being picked or gathered from the plant. The flower of the hop is the sole object of the cultivation of that plant, and it not only is, but necessarily must, to preserve its quality and value, be picked and gathered upon the spot. It seems difficult to distinguish the case of hops, from pease plucked by the hand for the use of man, as the phrase is, from the bind of the plant, or from beech mast, and acorns pulled from the trees. Hops are, in truth, the fruit of the plant, as much as the pod of pease. Upon principle, therefore, the mode of severing and setting out the tithe of hops contended for by the Plaintiff in error is not that which the law requires. Although there was a time when it was doubtful what the common law principle of severing and setting out this tithe was, the point is now settled even in the last resort. The first case is in 1 *Roll. Abr.* 614. tit. *Difmes* (Y), pl. 3. 14 *Jac.* 1. where it is said, "A man may set out his tithe of hops before they are dried." The stage of husbandry immediately preceding the drying is the picking; consequently, it was not then doubted, that they must be severed by picking before they are set out. In 1672, in the case of *Crouch v. Risden*, 1 *Sid.* 443. *Twysden J.* said, that it was uncertain whether they ought to be tithed by the hill, the pole, or the bushel. This proves nothing affirmatively on the subject, but only that he did not consider the subject as having received any determination which ascertained the general rule of law upon the point. About twenty years after this observation of *Twysden's*, the question came under consideration in the case of *Cbitty v. Reeves*, viz. in the year 1687. The Court there pronounced the rule of the common law, by declaring, that in case there had not been such usage as was proved in that case, the tithe of hops ought to be paid in kind, which they explained to be the tenth part of the whole after picking. The expression of paying it in kind,

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kind, is somewhat singular, and most strongly imports that any other mode would be a sort of substitution for the tithe itself. In 1698, in the case of *Gee v. Perch*, the custom alleged of paying ten shillings an acre, was decreed by the Court to be a bad custom; and in the absence of any good custom an account was decreed of a tenth part of the value of the hops, when the same were pulled from the bind or stem: and the true reason is there added, "at which time the tenth part is severable from the nine parts, and the tithe by law payable." In a subsequent suit in 1794, by the administratrix of *Gee*, the Plaintiff in the former action, against the same Defendant, 1 *Wood*, 436. the same doctrine is laid down by the Court; and this case is the stronger to shew the necessity of picking the hops, because the Defendant did not insist on setting out the tithe by the tenth row or hill, but had cut down ten hills together, and set out the tenth of the whole quantity, both hop and bind, thereby giving the titheowner his full proportion. Again, in 1720, *Bliss v. Gbandler*, the Court declared that hops are not titheable until they are picked; and that the tithe thereof ought to be paid in kind by the bushel, namely, every tenth bushel of the whole, after picking. The same rule prevailed in the two several cases of *Sneed v. Unwin*, in 1740 and 1752. Lastly, in *Walton v. Tyers*, decided in the House of Lords, in 1753, 5 *Brown, Parl. Cas.* 99. where the Defendant insisted on setting out every tenth hill, and cutting the bind; and on the other hand the Plaintiff demanded every tenth bushel, when picked; it was declared, that the mode insisted on by the Defendant was improper; and further, it was affirmatively pronounced, that the tithe ought to be set out after the hops are picked from the bind or stem. From this series of authorities, which is not impeached by any thing to be found in the books, or by any thing to be drawn from the nature of the case, it seems completely settled, that the severance of the tithe of hops must be by separating the fruit from the stem.

Seeing then what is the general rule as to severing the hops and setting out the tithe thereof, we may proceed to inquire, Whether any such usage as that which has been set up by the Plaintiff in error can be supported consistently with the rules of law? The usage stated in the bill of exceptions amounts to this, that the occupier shall, at his discretion, leave for the rector the tenth part of the hops, not severed, as we have seen that the common law principle requires; but in a stage of the husbandry of this article,

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short of that in which he is entitled by law to receive it, and that without compensation. This is precisely the same thing in principle as if it were contended that the rector, by custom, should receive a less quantity in that ~~field~~ of husbandry, when it is by law to be set out, than he is entitled to; for, abridging the quantity of the tithe, and calling upon the rector to incur expence, when he is not by law obliged so to do, come to the same end, since both equally reduce his profit. The question then is, Whether the usage contended for be good and available in law? Now there are three distinct things, besides the rules and principles of the common law, that control the right of tithes; viz. custom, modus and real composition. These three rest on different foundations, the confounding of which has introduced much of the perplexity and difficulty which have arisen in this cause. Custom, in respect of prædial tithes, chiefly regards the manner of setting them out. It must be immemorial; it requires no equivalent; it is to be presumed coeval with the original payment of tithes, or endowment of the parish church, provided it be not subject to fraud; for it never can be presumed that the Lord of the Manor, at the time of endowing the parish, meant to stipulate for such a mode of setting out the tithes as would defeat his own endowment. Hence come the different modes of tithing the same article in different parishes. In some places the modes of husbandry, in others, the fervor and zeal of Christians in the early ages, gave an advantage to the parson. When the Lords of Manors consecrated their tithes to any church, as they might have done before the second council of *Lateran*, probably they expressed, in the 'consecration, in what manner the tithe should be paid. *Cujus est dare, ejus est disponere*. See *Selden's History of Tithes*. The payment of tithes was at first voluntary, and of imperfect obligation. Afterwards, indeed, it was enforced by papal bulls, and by decrees of councils: but the canonists in all ages admitted that the custom of tithing was to be observed in every parish. *Linwood's Provinciale De Decimis* (a). Modus and real composition differ from each other in nothing more than in their origin. Modus must have existed from time immemorial; composition real must have been made before the disabling statute of the 13 *Eliz.* But both modus and real composition must be subsequent to the original endowment of the church, inasmuch as

(a) Fo. 196.

they control it, and are founded on the consent of the parson, patron, and ordinary. Now the usage of tithing hops insisted on by the Plaintiff in error, cannot be referred either to a custom, or to a *modus*, because the cultivation of hops was introduced within the time of legal memory. Whether the plant be indigenous or not, we are informed by many cases which occurred at a great distance of time from the present day, that its cultivation for use is modern; and, indeed, the evidence in the present case states, that in the parish of *Farnham*, and elsewhere in the kingdom, hops are "with reference to time of legal memory, modern and within time of memory;" and it was almost conceded at the bar, that as a custom which must be immemorial, reasonable, and certain, the usage contended for could not be supported, although it appears to have obtained a considerable time prior to the last hundred years, during which the parish has been under composition. In *Crouch v. Risden*, 1 Sid. 443. the Court refused to grant a prohibition upon the suggestion of a *modus* for hops, declaring that they would take judicial notice that hops were not of sufficient antiquity to become the particular subject of a *modus*, though hops, as well as other matters of novel introduction, might be included in a *modus* for small tithes in general. This case arose a considerable time before that of *Chitty v. Reeve*, which was decided in 1687; and after the case of *Chitty v. Reeve*, the same point was again determined in 1698; for in the case of *Gee v. Perch*, the defendant having set up a *modus* of 10s. an acre for hops, the Court declared the custom void in law; and, according to a short report of the same case, from a manuscript of Ld. Ch. B. *Dodd*; in *Rayner on Tithes*, p. 87. the second resolution is, "that no *modus* can be for hops, being a late thing." So Lord Ch. B. *Comyns*, in his judgment, in *Waltis v. Payne*, Com. 638. considers it as settled, that hemp, line, saffron, hops, and tobacco, are new things, and as such to be ranked with matters of a like nature, as small tithes. But it was contended, that the mode of setting out the tithe of a matter newly introduced with a reference to the time of legal memory, and which mode was possibly coeval with the introduction itself, might be good, as being reasonable, and that this was actually so by usage in other cases. To this it may be answered, that a custom of tithing, like every other custom, must be conformable to what is required by the common law; and that reasonableness or fitness will not alone dispense with other ingredients which necessarily enter into the definition of a custom. It

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would be repugnant to every principle of law, to hold that an obligation created by the general law of the land could be avoided within particular limits, by the immediate effect of a contrary practice of sixty or seventy years in that district; or, according to the argument at the bar, that there shall be a rule of law which is only to take place when there has been no practice to the contrary. Immemorial, reasonable usage may, indeed, locally supersede the common law, and introduce a different rule; but the common law cannot be different at *Farnham* from what it is in *Kent* or in *Essex*, or in other places. It must be the same in all places, otherwise there is no rule of the common law at all.

In support of the usage stated in the bill of exceptions, the case of *Chitty v. Reeve* was cited; the proceedings and decree in which cause are to be found in 1 *Wood*, 251. This case deserves particular examination. It arose in this very parish of *Farnham*; the opinion of the Court was given upon nearly the same statement of the practice of sixty years before the statute of *Jac. 2.* that is to be found in this bill of exceptions; and if that opinion were well founded in point of law, it would dispose of the question in the plaintiff's favour. A bill was filed by the administratrix of the lessee of the tithes, for an account of the tithe of hops, suggesting that the custom in *Farnham* was to set them out in the manner contended for by the present Plaintiff. The Defendant, the occupier, admitted that they ought to be set out by the tenth hill, but insisted that the growth of every tenth hill ought to be left upon the hill with the binds cut, and stripped from the pole, to be taken away by the tithe-owner to be picked elsewhere. Upon the evidence given in the cause it appeared to the Court, that the practice insisted upon by the Defendant would, for the reasons given, be destructive to the tithe; but that to set out the tenth row, where the rows were equal, and when not, the tenth hill, and to leave it standing, with the binds uncut, for the tithe, and for the impropiator to have a convenient time to come and cut the bind and pick the hops upon the ground, had been observed for above sixty years. This custom, usage, and practice, the Court declared to be reasonable and fitting to be observed; at the same time pronouncing the common law obligation, of setting out the tithes in kind, to be as before mentioned. One is at no loss to find out the reason why the defence was overruled; but it is not so easy to discover the ground upon which the Court could declare, that the custom, usage, and practice, alleged by the Plaintiff, was reasonable

able and fitting to be observed; at least, if by that language they meant to say, (as seems to have been the case, though the decree is only for an account,) that it was obligatory upon the tithe-owner, though it was contrary to the general rule of law which they themselves in the same breath declared. How they applied this custom, usage, and practice, as they call it, the decree gives us no information. They may have decided upon the effect of an usage of sixty years *proprio vigore*, and independent of the consideration how far it might be evidence of something further; they may have considered it as evidence of a legal, immemorial custom; or they may have considered it as evidence of a composition real. At any rate, the attention of the Court was not drawn to the general point, Whether either of the customs, set up by the parties, could have any foundation in law? The antiquity of either custom did not come in question, but only their comparative reasonableness, and on that alone the Court determined. The authority of that case, therefore, does not weigh much in the present, where the point as to the validity of any custom upon this subject is directly made. The other case mainly relied upon to shew, that a practice of long standing, although not properly a custom, may be considered as having the same effect, in the case of hops, is that of *Sneyd v. Unwin*, in 1740. There the Plaintiff insisted that the tithe should be set out in the manner now contended for by the Defendant in error. The Defendant relied on an ancient usage of tithing by the tenth pole or hill, after the binds are severed from the ground. The Court directed an issue, to try "Whether the usage was for hops to be tithed before they are picked from the stalk?" From this, it has been contended, that the Court must have been of opinion that such an usage might be good: but it is much too strong a conclusion to suppose a Court of Equity pledged to any settled opinion on a matter which, by directing an issue, it confesses may be more effectually investigated at law both as to the legal principles applicable to the usage proved, and as to the fact of usage itself. That a Court of Equity should pause, and call for information upon those heads for its own satisfaction, before it proceeds to a decree, cannot, in fair reasoning, furnish such an inference; and perhaps the Court might be less scrupulous, having the decree of *Chitty v. Reeve* before them, where their predecessors had been governed by an usage. In *Sneyd v. Unwin* the verdict was against the custom. Whether that arose from the party upon whom the affirmative lay

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failing in his proof of the usage having long subsisted, or from the direction of the judge upon the effect of the usage supposing it proved to be of long standing, we have no means of knowing with certainty; but it is reasonable to suppose that the same usage would not have been set up twelve years afterwards, namely, in 1752, unless strong evidence had been given of it in the first cause; and the declaration of the Court in the second cause seems to countenance an opinion, that the invalidity of the usage in point of law might have been the ground of determination, since the Court declared that the method insisted on "was not the legal method of tithing hops, but that they ought to be picked or gathered before the same are titheable," and decreed an account accordingly. The only just inference which can be drawn from that case is, that the Court of Equity did not think proper, any more than another Court of Equity in the present case, to determine upon a matter of custom, without the assistance of an investigation of the facts *viva voce*, and of the law which should result therefrom.

The usage insisted on by the Plaintiff in error appears also to be defective in reasonableness; for it is stated in the bill of exceptions, that the occupier is to leave the tenth row if equally planted, or the tenth hill if unequally planted. This mode of tithing, therefore, is more open to fraud than that prescribed by the common law, since the planter has it in his power to determine which shall be the tenth row or hill, and accommodate his cultivation accordingly, and as many hills are weak and many die, and he can begin to set out from what part he pleases, it would require very little contrivance so to set them out, that the hills allotted to the parson should be those which are weak and blighted. This is not merely an opening but an invitation to fraud. Authorities however have been resorted to, to shew that such a mode of setting out tithes has been considered as reasonable, and may be good by custom; and for this purpose the case of *Stebbs v. Goodluck, Moor*, 913. 1 *Leon*, 99. has been relied on. According to the report in *Moor*, the parson, as he alleged, was to have every tenth land for tithe of corn, beginning with the land next the church; and the occupiers knowing which of the lands would be the parson's, neglected to till, sow, and manure them as they did their own; for which fraud, the parson sued for tithe in kind, that is, every tenth sheaf, in the Spiritual Court: but the Court of *King's Bench* granted a prohibition, because the parson's remedy for the fraud was at common law. According to this report, it does not ap-

pear that the validity of the custom was at all taken into consideration, but only that the parson having sued in the Spiritual Court, and having stated a fraud as the only ground on which his suit there was founded, was told that his remedy was at common law, and therefore a prohibition was granted. But in the report of the same case, in *Leonard*, the reporter states that the opinion of *Wray* Ch. J. was, that the custom was against common reason, and void; but that if it were a good custom, then that the parson should have his action on the case at common law. Nothing more seems fairly to be collected from the two reports, than that the Court decided, that at all events the fact of fraud should not be tried in the Spiritual Court; the Chief Justice expressing his opinion as to the custom, from which no one is stated to have dissented. The *dictum* of Lord *Hobart* in *Hyde v. Ellis*, *Hob.* 250. is the only other authority cited to the same effect. The point immediately in judgment in that case was, Whether carrying the first crop of hay into the advanced state of tedding, and putting it into wind-rows, might be a compensation for exempting the second crop from payment of tithe? and it was determined, as it has often been since, that it might. By way of assimilation to the case then at bar, the report states his Lordship to have said, that at divers places they set out the tenth acre of wood standing, and so of grafs. It must be observed, that the law of tithes was not so well ascertained in the time of Lord *Hobart* as it is at present, and many opinions then fluctuated upon matters which have since been settled. With respect to wood, indeed, if it were titheable only by custom, as it was at that time supposed to be, the tithe-owner could only have taken it in the way that custom gave it to him. But the proposition as applied to grafs, or any subject titheable by the general law, is not warranted by any decisions ancient or modern, but is contrary to the course of them all. There must in all cases, and without any exception, be a severance from the freehold, so that what was part of the inheritance may become a chattel and vested in the parson. If this were not the case, the Spiritual Court would be ousted of its jurisdiction, for it can hold no plea of what relates to the freehold. In all the books, indeed, tithes are called lay chattels; but till severed they are not so; they still remain parcel of the freehold, so that severance is essentially necessary. That a particular piece of wood-land, or meadow-land, separately and immemorially enjoyed by the parson, may be

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a compensation for tithe of wood and hay, is undoubted; but no authority except the *dictum* above mentioned is to be found, to shew that the leaving a tenth of any titheable matter unsevered can be good by custom. The case of *Siedman v. Lye*, M. 11 W. 3. 1 Lord Raym. 504. is strongly in point. In a suit for tithe of hops a *modus* was set up, that if the parson send his servant, &c. to pull *aliquam partem lupulorum*, he should have the tithe of them, &c. But it was agreed by the Court to be "an ill custom, because it drives the parson to more pains than the law requires to entitle him to that which by law he ought to have in the same manner without such pains."

* The observation of Mr. Justice *Twissden*, in *Crouch v. Risden*, seems to have a contrary tendency to that which was contended for by the Plaintiff in error. When he observes that the legal manner of setting out the tithe of hops, whether by the hill, the pole, or the bushel, had not been settled; he must be understood to say, that in point of fact the tithe had been set out in these several ways in different parishes, but which of them was the legal way had not been then determined. Had he conceived that the practice which had long obtained in each particular parish, could constitute the legal mode in such parishes respectively, it is probable that he would have so said; but it seems plain that he conceived some general rule, founded on principle and applicable to all places, remained to be ascertained: that general rule has since been ascertained in the case of *Walton v. Tyers*.

The ground, however, upon which the Plaintiff in error principally relied, was that of a real composition, which it was argued might have taken place antecedent to the 13 *Eliz*; but it is very doubtful whether the manner in which, or the time when, the tithe itself shall be set out in kind, can be the subject matter of a real composition but only of the discharge of tithe.

In the *Codex* (a) it is said, that a composition real is, "where the incumbent together with the patron and ordinary make agreement by deed executed under their hands and seals that certain lands shall be discharged from the payment of tithes in specie in consideration of a recompence to the incumbent either in money or in lands to him and his successors for ever or in some other thing for their benefit and advantage." So Sir *Simon*

(a) *Gibson's Codex*, tit. 30. c. 5. p. 705. in *notit.* ed. 1713.

Degge observes: "That which we call a real composition is, where the present incumbent of any church, together with the patron and ordinary, do agree under their hands and seals, or by fine in the King's Court, that such lands shall be freed and discharged of payment of all manner of tithe forever, paying some annual payment, or doing some other thing, to the ease, profit, and advantage of the parson or vicar to whom the tithes did belong (a)." Indeed there are two requisites to constitute a real composition, namely, that the tithe shall be discharged, and that a compensation shall be given. Are these requisites to be found in this usage? That the tithes are not discharged must be admitted. Where then is the compensation? It was said that the parson was to have the binds; but the pleadings do not give them to the parson, and if they did, they are of no worth or value. It is obvious that in this case the parson is to give up the benefit of having the hops picked for him, and to do it for himself at a great expence, and in an inconvenient manner. For this he receives nothing: for according to the evidence, he is only to have the privilege of coming upon the land, of cutting the binds and picking the hops, and then carrying away the hops when picked. To this agreement, it was argued, the parson might have been induced to accede in order to tempt the occupiers of lands to plant hops, and so give encouragement to a very expensive cultivation. As to the inducement, if this were to be admitted as a compensation, it would equally well establish a custom of tithing corn by setting out the tenth land, or apples, by setting out the tenth tree; because, by a parity of reasoning, it might be presumed that the parson held out this favourable mode of tithing such articles in order to tempt the farmers and occupiers of lands to employ their wood-lands or pasture in such culture as might produce more beneficial tithe to himself. In short, it would make good a composition or *modus* to receive one fifteenth instead of one tenth of corn; for undoubtedly in all cases, the less that is taken for the tithe of any article, the more the occupier is encouraged to cultivate that article; and if this alone were to be admitted as a sufficient consideration, the objection of want of consideration would not lie in any case.

If therefore, on the presumption that the tithe had been originally so granted, or on any other supposition this method of

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setting out the tithe of hops might, by immemorial usage, be supported, still the argument will not apply to the present case, wherein no immemorial usage can have existed; and if the tithe-owner at the first introduction of hops had a right to his tithe by measure, the objection remains unanswered, that the composition cannot be good, because he parts with that right without receiving any compensation.

Supposing, however, that this can be the subject matter of a real composition, it will be right to examine the nature of the evidence upon which the composition is attempted to be supported. In fact, the evidence is not applicable to a composition real. It consists wholly of usage, and is that sort of evidence which is applicable to a *modus*, but has no reference to a particular deed of composition. Usage is in general a ground for presuming deeds, even against the crown: yet in the particular instance of composition for tithes, it is settled that where the deed cannot be produced, some evidence must be given referring to the deed, or shewing that it did exist, independent of mere usage. And the reason why this has been so held, is stated to be, that if it were otherwise the church would be defrauded, and every bad *modus* turned into a good composition. *Heathcote v. Mainwaring*, 3 Bro. Chan. Cas. 217. Indeed it may be collected from the Year Book 34 H. 6. 36. that the ancient law was, that an annuity founded on a real composition, in discharge of tithes, could only be claimed by producing the deed of composition, or by alleging an immemorial prescription. The presuming a deed from long usage is certainly a novel invention of the judges for the furtherance of justice and the sake of peace, where there has been a long exercise of an adverse right. For instance, it cannot be supposed that any man would suffer his neighbour to obstruct the light of his windows, and render his house uncomfortable, or to use a way with carts and carriages over his meadows for twenty years respectively, unless some agreement had been made between the parties to that effect, of which the usage is evidence. But with respect to a compensation for tithes the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents. There is no exercise of an adverse right, which is generally deemed necessary to raise the presumption. The best evidence of an agreement for a real composition having actually taken place is

the deed itself, but that can rarely be expected. In the case of *Sawbridge v. Benton*, *Anstr.* 375. instruments were given in evidence which strongly denoted that such an agreement must have taken place as they related, with a reasonable degree of probability, more particularly to such a transaction than to any other; wherefore the real composition was supported. Indeed, it appears to have been invariably holden that some evidence must be adduced to shew that such an agreement, though lost, did once exist. Such was the opinion of the Court of *Exchequer* in the cases of *Robinson v. Appleton*, 4 *Wood*, 10.; and *Hawes v. Swaine*, 4 *Wood*, 313.; and such was the opinion of Lord *Hardwicke* in *Rotherham v. Fanshawe*, 3 *Atk.* 628. In the present case there is wanting that which is indispensably necessary where a real composition is to be presumed, namely, mutual loss and gain on the respective parts of the parson and occupier. Where the occupier has long retained that which by law he ought not to retain, and yields to the parson that which by law he is not bound to yield; this mutuality of loss and gain acquiesced in for a great length of time, is strong corroborating evidence of such an agreement having been executed by the necessary parties: but where this mutuality is not to be found, the presumption must be that no agreement took place, whereby the parson consented, with the permission of the patron and ordinary, to forego his legal rights without any retribution. The bare fact, therefore, of the parson having been in the perception of less than what is due to him, or of that which is due in a less beneficial manner, is not of itself a ground for procuring a real composition: and this was the opinion of *Rolle*, as appears in the case of the Earl of *Hertford v. Leech*, 8 *Car.* 1. (a) where in stating what he conceives were the reasons of the Court for holding that certain lands were not discharged of tithes, he gives this as one, "that it shall not be intended that any real composition or consideration was given for the discharge of tithe without shewing that specially." Such has been considered to be the law ever since.

From this course of reasoning it follows that the tithe of hops, by the principles of the common law, is payable from the true time of the severance of this titheable matter; namely, from the picking; that no custom or *modus* can apply to this any more than to many articles of modern introduction; that no long prac-

(a) Vid. 2 *Danv. Ab.* 612. tit. *Dismes* (I.), pl. 2. *Fin. Abr.* tit. *Dismes* (I. 2), pl. 2.

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tice, even though concomitant with the introduction of the article itself, can have the effect of a custom or *modus*, and vary the legal principle by which the tithe is to be set out; that as a real composition, the mode of tithing contended for cannot be supported, since it does not fall within its definition; that if it did, there is in this case no evidence whatever of the existence of a deed of composition; that the usage contended for would furnish to the farmer a temptation almost irresistible to cheat the parson, and would subject the property of the church to imminent peril, and therefore that upon the matter set out in the bill of exceptions, the direction was rightly given to the jury to find for the Defendant.

After hearing the opinion of the Judges, the House, upon the motion of the Lord Chancellor, resolved that the judgment of the Court of *King's Bench* should be affirmed.

Mr. *J. Buller* was prevented by illness from attending in Court during any part of this term, and early in the ensuing vacation died at his house in *Bedford-Square*.

THE END OF EASTER TERM.

E R R A T A.

- Page 73. line 38. in marg. for "B." read *A*.
 137. — 11. from bottom, for "as it served," read *as it was served*
 155. — 3. note (a), after "insurance," insert *or goods*.
 176. — note (a), for "*Brown P. C.*" read *5 Brown P. C.*

C A S E S

ARGUED AND DETERMINED

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IN THE

Courts of COMMON PLEAS

AND

EXCHEQUER CHAMBER,

AND

In the HOUSE OF LORDS;

IN

Trinity Term,

In the Fortieth Year of the Reign of GEORGE III.

(The following case was decided in last Easter Term, but its publication was unavoidably delayed till the present period.)

LONG v. DUFF.

Idem v. BOLTON.

May 26th.

THESE were two actions on policies of insurance on the ship *Lucy*, at and from *Padstow* in *Cornwall* to *Leghorn*.

The causes were tried before Lord ELDON, Ch. J. at the *Guildhall* sittings after *Michaelmas* term 1799, and verdicts were found for the Plaintiffs in both actions, under the following circumstances: The *Lucy* was a *Spanish* built ship purchased at *Hamburg* by the Plaintiff, a *British* subject; she was not registered, but had paid the alien duties. Previous to setting sail upon the voyage insured, the captain of the *Lucy* applied to the Admiralty for a licence to

A foreign built ship, British owned, is not required to be registered: and may therefore sail without convoy, being within the exception of the convoy act 34 Geo. 1. c. 76. s. 6. If a policy of insurance be

effected on such a ship, it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign built.

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proceed without convoy to *Leghorn* and *Naples*, but only obtained a licence for *Naples*; notwithstanding which he proceeded on the voyage to *Leghorn* without convoy, and was captured off that place by a *French* privateer. The only difference between the two cases was, that in the former it was represented to the underwriters at the time of effecting the policy that the *Lucy* was a foreign built ship and not registered; but in the latter it was not.

On the part of the Defendant it was objected in both actions, that as the licence obtained did not extend to the voyage insured, the *Lucy*, though a foreign built ship *British* owned, was within the provisions of the 38 Geo. 3. c. 76. which makes void all policies upon ships sailing without convoy; and in the second, that supposing her not to be within the provisions of the convoy act, that circumstance ought to have been communicated to the underwriters.

On these grounds a rule *nisi* was obtained in *Hilary* term, calling on the Plaintiffs to shew cause why new trials should not be had, and nonsuits be entered; and the cases were afterwards argued by *Shepherd* and *Williams*, Serjts. for the Plaintiffs, and *Lens* and *Bayley*, Serjts. for the Defendants.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ELDON, Ch. J. There was nothing to distinguish the case of *Long v. Duff* from *Long v. Bolton*, except this single circumstance, *viz.* that in the latter it was not disclosed to the underwriters that the ship in question was of such a peculiar description, as not to fall within the provisions of the convoy act. With respect to which, we are all of opinion that it was properly left to the Jury to determine whether according to usage it was the duty of the assured to give this information, or of the underwriter to satisfy himself upon that point. The Jury have decided that it was the business of the underwriter to obtain this information for himself.

With respect to the general point, the question is, Whether a vessel in the situation of the *Lucy*, departing without convoy, (not having obtained a proper licence so to do,) can be deemed to be protected by the policy? or, Whether that policy is not altogether void under the provisions of the 38 Geo. 3. c. 76. s. 4. which declares that every policy of insurance on any ship or cargo within the purview of the act which shall depart without convoy, or shall wilfully desert its convoy, shall be null and void? The pre-

of trade to prevent ships sailing without convoy, except in certain cases;" and the sixth section enacts, "that it shall not be lawful for any ship or vessel belonging to any of his majesty's subjects, except as hereinafter provided, to sail or depart from any port or place whatever, unless under the convoy or protection of such ship or ships, vessel or vessels, as shall or may be appointed for that purpose."

The principle of policy stated in the preamble to this act will undoubtedly apply to ships foreign built in the possession of *British* owners, as well as to ships *British* built. But whether it was intended to be carried to that extent is the question we are now to decide, and which we must decide by examining the clause which is to carry the principle into effect. The sixth section provides, that nothing in the act contained by which ships are required not to depart without convoy, shall extend "to any ship or vessel which is *not required to be registered* by any act or acts of parliament in force on or immediately before the passing of this act." It was contended on the part of the underwriters, that the words "*not required to be registered*," might be construed "*not entitled to be registered*." But it is clear from the context, that the legislature intended to use the words "*not required*" in another sense; for in the line immediately preceding, which describes the prohibitions of the act, the words are "*required not to sail without convoy*." The true question is, Whether this ship was required to be registered by any statute in force when the convoy act passed? It appears that she is foreign built, that she was purchased previous to the time when the prohibition took place; and in order to ascertain whether this ship being *British* owned is required to be registered, or not, we must look back to the provisions of our navigation laws. If, indeed, this ship be required to be registered, having departed from a *British* port, without having procured herself to be registered, she is for that offence, by 26 Geo. 3. c. 60. s. 32, *ipso facto* forfeited. We therefore must be thoroughly satisfied, that we stand on the most solid grounds before we hold this ship subject to a regulation, by the having infringed which, if she be indeed subject to it, she has incurred the penalty of forfeiture. I shall not dwell upon any of the acts relative to navigation which were passed previous to the 12 Car. 2. But it may be observed in general, that it appears clearly from the uniform tenor of all the early acts upon the subject, whether passed during the time of the commonwealth (a), or subsequent to the restoration, that the policy of the legislature ever was to confine the privileges of our trade, as far as was consistent with the extent of that trade, to *British* built shipping. But as the quantity of *British*

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(a) See Scobell's A.D., Anno 1651, c. 22.

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built shipping, at the several periods when those acts were passed, was not adequate to carry on the whole trade of the country, it became the secondary object of the legislature to confer privileges on foreign built ships in *British* ownership. In proportion, however, as *British* built shipping increased, the privileges conferred on foreign built ships in *British* ownership were from time to time restricted. On the head of registry I have not found anything worth stating, until the passing of the 12 *Car. 2. c. 18*. The first section of that act "for the increase of shipping, and encouragement of the navigation of this nation, wherein under the good providence and protection of God, the wealth, safety, and strength of this kingdom is so much concerned," enacts, "that no goods whatsoever shall be imported into, or exported out of any of the lands, islands, plantations, or territories in his Majesty's possession in *Asia*, *Africa*, or *America*, in any other ships but such as do truly and without fraud belong only to the people of *England* or *Ireland*, dominion of *Wales*, or town of *Berwick upon Tweed*, or are of the built of and belonging to any the said lands, islands, plantations, or territories, as the proprietors and right owners thereof." This clause does not relate to the European trade, but only to the trade with the *British* settlements in *Asia*, *Africa* and *America*. The effect of it is to give the privileges of that trade to all ships whatever owned by the people of *England*, *Ireland*, and *Wales*; but in the case of ships owned by the people of any *British* settlements, it also requires that such ships should be of the built of those settlements. The third section which relates to the importation of goods from the settlements into *England*, *Ireland*, and *Wales*, confines that privilege solely to ships in the ownership of those countries. The eighth section prohibits the importation of goods from *Russia* into *England*, &c. except in ships owned by the people of *England*, &c. and also prohibits the importation of goods of the growth of *Turkey*, except in ships *English* built; unless in ships of the built of the place from whence the commodities come, or of the port from whence they are most usually shipped for transportation. The tenth section then establishes a species of register; "and for prevention of all frauds which may be used in colouring or buying foreign ships," it enacts that no foreign built ship shall be deemed an *English* owned ship, or enjoy the privilege thereof, until such time as the owner shall have made the same appear by oath to the chief officer of the customs of the port where the ship is, which officer is thereupon directed to give a certificate of her being *English* owned, and to keep a register of all such certificates as he shall give,

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and make a return thereof to the chief officers of the customs in *London*. Taking the whole of this act together, it appears to describe what are *English* built ships, and what are *English* owned ships; and in what cases a foreign built ship *English* owned shall have the privileges of an *English* ship: but there is nothing which requires any foreign ships to be registered. The result of the act is, that a foreign built ship, though *English* owned, unless registered as such, shall be treated as an alien ship. Though it was highly politic to confine the privileges of *English* ships to such as should be registered, there seems to be no reason why *English* owners should not be allowed to carry on foreign trade under the same advantages as foreigners, and liable to the same duties. By the 13 & 14 *Car. 2. c. 11. s. 6.* the officers of the customs in all the ports of *England* are directed to give an account to the collector of the port of *London* of all foreign built ships in their ports *English* owned, for which certificates have been granted, which account is to be transmitted to the *Exchequer* and there to remain of record; and it is enacted, that no foreign built ship not purchased before the 1st of *October* 1662, and expressly named in the said account, though *English* owned and manned, shall enjoy the privileges of an *English* ship, but shall be liable to alien duties; with the exception of such ships only as shall be captured by letters of marque or reprisal, and condemned in the *Admiralty*. The 15 *Car. 2. c. 7. s. 6.* which prohibits the importation of commodities of the growth of *Europe* into any of our colonies in *Africa*, *Asia*, or *America*, unless shipped from *England* and in *English* built shipping, or such as was purchased before the 1st of *October* 1662, and duly certificated, will not, I think, be found to carry the subject of *English* ownership beyond the preceding act. The next material act is the 7 & 8 *Will. 3. c. 22.* the second section of which prohibits the importation of any goods whatsoever into our colonies in *Asia*, *Africa*, or *America*, in any ship but what is of the built of *England*, *Ireland*, or the said colonies: and the seventeenth section declares, that no ship shall be deemed or passed as a ship of *English* or plantation built until it shall be registered by the owner in the manner and form directed by the act. Then follows a particular provision for the registering of prize ships in a special manner; and small vessels of a certain description employed in the rivers or on the coasts of the plantations are excepted altogether. This act of King *William* applying only to the plantation trade, lest the employment of all other ships not engaged in that trade,

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whether *British* built, or foreign built and *British* owned, exactly on the same footing as they stood before. Their situation seems not to have been altered till the passing of the 26 Geo. 3. c. 60. on which the present question principally depends. After the best consideration which I have been able to give that statute, and after conversing upon it with the noble lord who framed it (a), as well as with the learned author of the treatise (b) to which it gave rise, the determination I have come to is, that foreign built ships in *British* ownership are not required to be registered, and consequently that this verdict must stand. The preamble of that act recites, "that it is proper that the advantages hitherto given by the legislature to ships owned and navigated by his majesty's subjects should from thenceforth be confined to ships wholly built and fitted out in his majesty's dominions." The legislature thereby declared, that the time was then come when the policy of employing *British* built shipping exclusively in the commerce of this country might be employed in its utmost extent. But there is not a single word in the preamble from which it may be collected that any other than *British* built ships are required to be registered. The statute enacts, that after the 1st of August 1786, no foreign built ship except prizes, nor any ship built upon a foreign bottom, although *British* owned, "shall be any longer entitled to any of the privileges or advantages of a *British* built ship or of a ship owned by *British* subjects," but that such advantages shall be confined to ships wholly of the built of this country or of some of our possessions. Then follows a proviso, that nothing in the act contained should prevent such foreign built ships as before the 1st of May 1786 were *British* owned and registered, from continuing to enjoy the privileges which they had before enjoyed; nor to deprive any ship built upon a foreign bottom, and registered before that day, from continuing to enjoy the privileges to which she was then entitled; nor to prevent any such ship begun to be repaired or rebuilt before that day from being registered under the act by virtue of an order of the commissioners of customs. This order they were authorized to grant if it should appear to them upon oath that such ship was *bonâ fide* stranded, being the sole property of a foreigner, or that she was a droit of *Admiralty*, and under either of these circumstances was sold to a *British* subject, and was so much repaired that two-thirds of her were *British* built. It is clear from the last pro-

(a) Lord Hawkebury, now the Earl of Liverpool.

(b) *Receur's Law of Shipping.*
vision

vision that the legislature meant to require all those ships to be registered which were entitled to be registered, and to prevent those from being registered which were not required to be registered. On the third section of this act much reliance has been placed. The object of that clause was to extend the registry introduced by the 7 & 8 W. 3. into the plantation trade to the *European* trade. It therefore enacts, that "all and every ship" having a deck, and being of fifteen ton burthen and upwards, and *British* owned, shall be registered in the manner therein-after mentioned. It is quite clear, however, that this clause must be construed according to the tenor of the act, and must be confined to such ships as could be registered in the manner therein-after directed; for it is impossible to contend, that because the legislature uses the words "all and every ship," it meant therefore to require even those ships to be registered which, as appears from other parts of the act, were intended to be prevented from being registered. By the sixth section it is provided, that nothing in the act shall extend to require to be registered any ship of war, or vessel belonging to the royal family, or employed in inland navigation. And the 27 Geo. 3. c. 19. §. 8. further provides, that vessels not exceeding thirty tons and not having a whole deck, and solely employed in the *Newfoundland* fishery, shall not be subject to be registered. The general principle introduced by the 26 Geo. 3. being, that all *British* built ships should be registered, it became necessary to introduce these exceptions: and I am of opinion, that the words "not required to be registered", employed in the sixth section of the convoy act, cannot be satisfied by being applied to these clauses, since the ships thereby excepted from the necessity of obtaining a certificate of registry, from the nature of their employment can never be in a situation to require convoy. It has been argued, that as the twenty-eighth section of the 26 Geo. 3. c. 60. has given two sorts of registry, one relating to *British* built ships, and one to foreign built ships, all foreign built ships are therefore within the meaning of the latter sort. But the meaning of the legislature upon this head is clear. It had been declared that all foreign built ships *British* owned, which had been registered previous to the 1st of May 1786, should continue to enjoy certain privileges; and the twenty-ninth section required that all the old registers of such ships should be delivered up and new ones granted; it is obvious, therefore, that the "certificate of foreign registry for the *European* trade, *British* property," mentioned

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mentioned in section twenty-eight, was intended to apply to those ships which, though foreign built, were to continue to enjoy the privileges to which their former register entitled them. But it is impossible that it should be intended to apply to such foreign built ships as were not registered before the 1st of May 1786, since its object was to prevent them from enjoying the privileges which that certificate was calculated to confer. It appears from *Reeve's Law of Shipping* (a), that as *British* built ships only were entitled to the plantation trade, the certificate of "*British* plantation registry" was adopted by the desire of the commissioners of the customs, to distinguish those ships from foreign built ships *British* owned, which were entitled to the *European* trade, and to which the certificate of "foreign ships registry for the *European* trade, *British* property," was given. The twenty-ninth section of that act also takes a distinction between those ships which are *required* to be registered from that time, *viz.* *British* built ships, and those ships which are *entitled* to be registered in consequence of the previous certificate of registry obtained by them; and then directs that both shall obtain registers. Subsequent to this act, therefore, all those ships which are entitled to be registered, are required to be registered, and the thirty-second section of the act subjects them to forfeiture in case they attempt to proceed to sea without having been registered. It is material to observe, that this very case shews in what manner the above statute has been understood; for if the ship which was the subject of the present insurance had been required to be registered, she would not have been permitted to clear out for sea, not having in fact been registered, but would have been seized as forfeited. The last section of 27 Geo. 3. c. 19. which was passed for the express purpose of obviating doubts on the 26 Geo. 3. shews the intention of the legislature that the latter act should have that construction which has now been put upon it. It declares that all ships not entitled by the 26 Geo. 3. to the privileges of *British* built or *British* owned ships, and all ships not registered according to the said act, shall, although owned by *British* subjects, be deemed alien ships and be liable to the same penalties and forfeitures as alien ships. It is not said that ships not registered shall not be navigated or owned by *British* subjects; a *British* owner of a foreign built ship may engage in neutral trade, and will be liable to the alien duties, but

(a) See pages 437, 8. 447, 8.

it was not the policy of the legislature to prevent *British* subjects from employing foreign ships in neutral trade, in as ample a manner as they can be employed by aliens. The 34 *Geo. 3. c. 68.* contains several provisions for granting new certificates upon a transfer of property; but it appears to me to proceed upon the same ground as the 26 *Geo. 3.* and to regulate those cases only in which a title to a certificate having been given, a certificate is required to be obtained, and in which the parties obtaining it are to derive some advantage from it.

In this view of the subject we are all of opinion, that the objection taken cannot be supported, and therefore that the verdicts must stand.

Per Curiam,

Rule discharged.

PARKE v. MEARS.

June 17th.

DEBT on bond and verdict for the Plaintiff on the issue of *non est factum*, with liberty to the Defendant from Lord Eldon Ch. J. before whom the cause was tried, to move to set that verdict aside and have a nonsuit entered, if the Court under the following circumstances should think the execution of the bond was not sufficiently proved. The bond was executed in *Ireland*, and there were two attesting witnesses to it, one of whom, a person of the name of *Hearne*, was called at the trial to prove the execution. It appeared that the bond had been executed in a room adjoining to that in which *Hearne* was a few minutes previous to the time at which he was desired to attest, but the Defendant himself was present, and heard the attorney request the witness to attest this among many other deeds; the other attesting witness however was still in the room where the deed had been executed. It was proved also that *Hearne* knew the Defendant's handwriting, and that the Defendant knew he was acquainted with it, and that the Defendant himself had acknowledged the instrument.

A bond having been executed by *A*, and attested by one witness, was carried into an adjoining room, and shewn to *B*, who was desired to attest it also, which he accordingly did in the presence of *A*.—Held that *B* was a good witness to prove the execution.

Bayley Serjt. now moved for a rule *nisi* to enter a nonsuit, and contended, that as no subsequent acknowledgment (a) of the instrument by the Defendant, could dispense with the regular proof of the execution of the deed, the case must stand as if none such

(a) *Abbot v. Plumbs, Dougl.*, 216. *Laing v. Raine, ante*, p. 85.

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had been made; that the evidence of *Hearne* was insufficient, as he was not present at the time of the execution, and that evidence should have been produced to shew that the deed was not complete at the time *Hearne* was called on to attest, since if it was complete his attesting subscription was nugatory.

But *the Court* thinking the whole might be considered as one transaction, held the execution of the bond sufficiently proved (a).

Bayley took nothing by his motion.

(a) In the case of *Grellier v. Neale* and others, *Peake N. P. Cas.* 146. a point nearly analogous to the present decision seems to have arisen. There "to prove a partnership deed the Plaintiff's counsel called the subscribing witness, who said she did

not see the deed executed, but that *Neale* brought it to her and desired her to put her name thereto as a subscribing witness, which she did," and this appears to have been deemed sufficient proof of the execution of the deed by *Neale*.

June 19th.

NORTH and another v. LAMBERT.

Where the Plaintiff enters an appearance for the Defendant under the statute, judgment may be signed without any demand of a plea.

IN this action the declaration was filed by the Plaintiffs on the 11th of *May*, and notice thereof given and a rule to plead entered in due time. On the 16th of the same month the Defendant having entered no appearance, the Plaintiffs entered one for him, and signed judgment without demanding a plea.

Shepherd Serjt. having on a former day obtained a rule *nisi* for setting aside this interlocutory judgment and all subsequent proceedings thereon with costs, on the ground of a demand of a plea being necessary;

Marshall Serjt. now shewed cause, and contended, that where the Defendant does not enter an appearance, the Plaintiff has a right to sign judgment without demanding a plea.

The Court on inquiry of the officers found the practice to be as stated on the part of the Plaintiffs, viz. that where the Defendant does not appear, judgment may be signed without any demand of a plea (a).

Rule discharged with costs.

(a) *Reg. Gen. B. R. T.* 1 G. 2. *Reg. Gen. C. B. M.* 1 G. 2. *Jones v. Wilkinson, Barnes*, 249. and *Palk v. Rendle*, 8 T. R. 465. But where the Defendant has appeared, judgment cannot be signed against him without a previ-

ous demand of a plea, though he has neglected to take the declaration out of the office, *Nott v. Oldfield, B. R.* 1 *Wils.* 134. and *White v. Dent, ante*, vol. 1. p. 341.

(IN THE EXCHEQUER CHAMBER.)

June 20th.

WALKER v. BAYLEY in Error.

THE Court of *King's Bench* having given judgment against the Plaintiff in error, in an action upon an attorney's bill, he brought a writ of error in this Court, which was afterwards non-prossed and the judgment below affirmed.

Heath now moved that it might be referred to the clerk of the errors to compute interest on the judgment below, from the day of its being entered up to that of the affirmance; and observed, that the case of *Shepherd v. Mackreth*, 2 H. Bl. 284. in which it was first settled that interest might be given by this Court, was an action on an attorney's bill.

But the Court said that similar applications had been frequently made and refused; and that the Court in *Shepherd v. Mackreth*. did not advert to the circumstance of the action being brought upon an attorney's bill, their attention being only directed to the general question, Whether interest could be given by this Court or not?

Heath took nothing by his motion.

If judgment for the Plaintiff on an attorney's bill be affirmed in the Exchequer chamber, that court will not allow interest.

DOE ex dem. BANKS v. BOOTH.

June 21st.

EJECTMENT for three toll-houses with the toll-gates thereunto belonging. The cause was tried before *Rooke J.* at the spring assizes at *York*, when a verdict was found for the lessor of the Plaintiff, subject to the opinion of the Court on a case which stated in substance, that the trustees under an act of parliament made in the 17 Geo. 3. for repairing and widening the road from *Halifax* to *Sheffield*, by deed of the 5th April 1779, in consideration of 100*l.* paid by the lessor of the Plaintiff to the treasurer of the said road according to the direction of the statute, did grant, bargain (a), sell, and demise to the lessor of the Plaintiff such proportion of the tolls arising from the road and of the

the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due to him.—Held that he might well maintain his action, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree.

The trustees under a turnpike act, having demised to one of several mortgagees such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same as the sum advanced by him bore to

(a) This was according to the form of the mortgage inserted in the act, page 743.

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turnpikes and toll-houses for collecting the same, (being the premises mentioned in the declaration,) as the said sum of 100*l.* should bear to the whole sum due and owing on the credit thereof, to be holden from the 5th of *April* 1779 during the continuance of the above statute, till the said sum of 100*l.* with interest at 5*l.* per cent. should be paid; that the said 100*l.* with four years interest up to the 5th of *April* 1799 is still due; that the sum of 3600*l.* 10*s.* is the whole principal money due and owing on the credit of the said tolls and the turnpikes and toll-houses for collecting the same; that the said tolls, turnpikes, and toll-houses on the 22d of *September* 1798, were demised to the Defendant for two years from the 1st of *October* 1798 at 303*l.* per annum, and that he is now in possession thereof and has paid all rent due; that the costs of procuring the above act, as also of procuring another act of 38 *Geo.* 3. for continuing the same for 21 years have been paid, except the sum of 12*l.* for payment of which the treasurer has sufficient money in his hands; that there is due to other mortgagees of the said tolls, turnpikes, and toll-houses, three years interest on the several sums secured to them by their respective mortgages up to the 5th of *October* last, and to some of them four years interest; that one year's interest on the said sum of 100*l.* due the 5th of *April* 1796 was in *March* 1799, and before any interest had been paid to any other creditors or mortgagees on the tolls due in 1796 tendered to the lessor of the Plaintiff, being as much as had or has been paid to any of the other mortgagees, which he then refused, insisting on the whole interest being paid; that the interest which became due in 1797 and since, has not yet been paid to any of the creditors or mortgagees, there not being sufficient money to pay the same and what is due for the repairs of the road; that at the time when the ejectment was served, the treasurer had in his hands 58*l.* more than sufficient to pay the costs of procuring both the above-mentioned acts; that the lessor of the Plaintiff gave notice to the Defendant, that the ejectment was brought for the purpose of recovering the possession of the toll-houses with the toll-gates thereto belonging, to the intent that the Plaintiff might pay and apply the money arising from the toll-gates in discharge of the interest due upon the sum of 100*l.* by him advanced on the credit of the tolls arising from the said toll-gates, and not to recover such possession to reimburse him the said principal sum of 100*l.* so advanced as aforesaid, or any part thereof.

Williams Serjt. was to have argued in support of the verdict, but the Court called on the other side to begin.

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Clayton Serjt. for the Defendant. This ejectment cannot be supported, being contrary to the policy of the act of parliament. The trustees and the lessor of the Plaintiff do not stand in the relation of a common mortgagor and mortgagee, for the trustees do not act for their own benefit but for the benefit of the public. In page 735 of the act, the trustees are authorised to remove, alter, or discontinue the turnpike gates or toll-houses or any of them as they shall think expedient, and in page 738 they are "authorised and empowered from time to time as they shall think proper to lessen, vary, or alter all or any part or parts of the tolls thereby granted at all, any, or either of the turnpikes within their respective districts, and to raise the same again so as they do not exceed the tolls by that act granted, and so as such reduction be with the consent of the several persons who shall be entitled to three-fifth parts of the money then due on the credit of the tolls." These discretionary powers in the trustees however will be nugatory, if the mortgagee may at any time take into his own hands the management of any of the toll-gates when recovered by action. Indeed in page 739 the trustees are empowered to lease the tolls for three years, and apply the money arising therefrom in such manner as the tolls so leased are directed to be applied; now if the Plaintiff recovers, the above provision of the act will be altogether superseded, since the leases granted under it will be of no avail. Besides, in page 745, it is directed that all persons to whom any mortgage shall be made under the act, shall in proportion to the sum mentioned in the mortgage be creditors on the tolls in equal degree one with another, "and shall have no preference in respect of the priority of any money advanced." But if any one mortgagee be allowed to recover, he will thereby gain a priority denied him by the act. In *Fairtitle d. Myther v. Gilbert*, 2 T. R. 171. which was nearly similar to this case, the words of Mr. Justice *Asburs* are, "if any creditor had a power to enter and take possession of the toll-gates he would gain a priority which the act has denied, and it is very fit that this should not be taken out of the hands of the trustees, because they are trustees for all the creditors, and were considered by the legislature as the most proper persons to have the whole management of every thing to be done in pursuance of the act: it was foreseen that the whole sum

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wanted would not be advanced by any one person, and therefore for the encouragement and security of all persons who were willing to advance money, it was necessary that the collection of the tolls should remain with the trustees." It is true that in that case the toll-houses and toll-gates were mortgaged as well as the tolls, though the words of the act only authorised the trustees to mortgage the latter; but it should seem that under a power to mortgage the tolls, a power to mortgage the toll-gates as incident to it would pass; and though some stress was laid upon this objection by the Court, yet the principal ground of the decision seems to have been the inconvenience which would ensue if any one mortgagee were permitted to take the toll into his own hands. Besides, the lessor of the Plaintiff is only entitled to a proportion of the tolls and toll-houses. If therefore he were to recover such proportion only, he would not thereby be authorised to collect more than that proportion of the tolls, not being agent for the other creditors: and it would be impossible from the nature of the thing to collect that proportion only. If it be contended that the mortgagee will be without remedy, it may be answered, that the trustees are like other public officers liable to be punished for any misapplication of the money entrusted to them; or the mortgagee may recover his proportion when collected in an action for money had and received.

Lord ELDON Ch. J. The case of *Fairtitle v. Gilbert* admits all that is necessary for the lessor of the Plaintiff to contend. The mortgage executed in that case was a mortgage of the whole, not of any aliquot part; and the toll-houses and toll-gates were also inserted in the mortgage, though the act only authorised the trustees to mortgage the tolls. The questions made were; 1st, Whether the trustees had any authority to mortgage the toll houses and toll-gates? And 2dly, if they had not, Whether they were not estopped by their own deed? The Court held that the act gave no authority to mortgage the toll-houses and toll-gates, and that as the trustees were not acting for their own benefit, but for the benefit of the public, they were not estopped. It was there argued that the only mode of effectuating the conveyance of the tolls, was to enable the trustees to mortgage the toll-gates. But in answer to this, Mr. Justice *Asbursft* observed, that "the act expressly gives the trustees power to mortgage the tolls, but the reason why it does not give them a further power is, because no creditor

“is to have a preference. Now if any creditor had a power to
 “enter and take possession of the toll-gates he would gain a
 “priority which the act has denied.” But why would he have
 gained a priority? Because the mortgage was a mortgage of all
 the tolls, not of any proportion: for I deny that in the latter case
 any priority would have been gained, since the lessor of the Plaintiff
 would become the bailiff of the rest of the creditors as to all except
 his own proportion. It was thought that if a power had been given
 to mortgage the toll-gates a difficulty would have arisen, by giving
 a preference, which was contrary to the intention of the act. But
 it does not appear to me that this difficulty would have arisen even
 if such a power had been given. For I should have been inclined
 to hold, that whatever were the form of the demise, it could
 only operate so as to effectuate the act; that is, so that every other
 creditor should receive his due proportion, for which purpose the
 mortgagee must have stood in the situation of bailiff or trustee for
 all the other creditors. The act in this case however seems cal-
 culated to meet the very difficulty which the Court there felt: for
 this act empowers the trustees “to demise or mortgage the said
 “tolls or any part or parts thereof and the turnpikes and toll-
 “houses for collecting the same (a).” If any one person ad-
 vanced the whole sum, then the whole was to be mortgaged;
 if several, then the form of the mortgage inserted in the act shews,
 that each creditor was to have in mortgage only such proportion
 of the tolls as the sum advanced by him should bear to the whole
 sum advanced. All the difficulty therefore suggested in the ar-
 gument of the case in the *King’s Bench* is obviated by this act.
 For this act does contain a power to demise the toll-houses and
 toll-gates; and it was admitted in the *King’s Bench* that if the
 act in that case had contained such a power, the ejectment might
 have been maintained: at the same time this act cures the dif-
 ficulty which was thought to be the consequence of allowing an
 ejectment to be maintained, by requiring that a proportion of the
 tolls only should be mortgaged to each creditor. There is a
 great difference between a demise of tolls and of toll-houses.
 The former only gives a personal interest, in respect of which
 an action for money had and received may be maintained, the
 latter gives an interest in land which is within the statute of mort-
 main. The trustees in this case have executed an indenture

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under the act, the effect of which was, to transfer the title vested in them. Being authorised to grant a real interest in the toll-houses, all the consequences of law must attach upon that interest unless excluded by the act; and it is not for this Court to say that the legislature ought to have restrained the mortgagee from seeking his remedy by ejectment. The money advanced by the mortgagee would be very ill secured if his only remedy was either an application to the vindictive power of the Court of *King's Bench*, or a suit in *Chancery* in which all the other thirty-five mortgagees must be made parties. With respect to the action for money had and received, it would be a sufficient defence for the trustees to shew that they had distributed all the money received according to the provisions of the act.

Per Curiam,

Judgment for the Plaintiff.

June 21st.

WATSON v. CHRISTIE.

In trespass for assault and battery and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery, with a view to reduce the verdict below the amount of the damage actually sustained, if those circumstances could have been pleaded.

TRESPASS for assaulting and beating the Plaintiff. Plea not guilty. At the trial it appeared that the Defendant was the captain of a ship, and the Plaintiff one of his crew; that the Plaintiff while under the Defendant's command had been so severely beaten by order of the Defendant, that he had ever since that time been in a state of extreme ill health, and was likely to continue so during the rest of his life, which he was in some danger of ultimately losing in consequence of the assault. On the other hand, it was offered to be shewn that the beating in question was given by way of punishment for misbehaviour on board the ship, and it was insisted that the conduct of the Defendant at the time of the assault being necessarily in evidence proved that misbehaviour.

Lord *Eldon* Ch. J. before whom the cause was tried, directed the jury, that the only questions for their consideration were, Whether the Defendant was guilty of the beating? and what damages the Plaintiff had sustained in consequence of it? that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet that such a defence could not be resorted to unless put upon the record, in the shape of a special justification; that the Defendant had not said on the record that this was discipline, or justified it on any ground; that much evil
beyond

beyond the mere act of wrong had been actually suffered; which evil had been occasioned by a cause which the Defendant admitted he could not justify; that in his Lordship's judgment therefore, the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the jury should give damages to the extent of the evil suffered, without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond a compensation for the injury actually sustained they would give too much, but that if they gave less they would not give enough.

The jury found a verdict for 500*l.* being all the damages laid in the declaration.

Shepherd Serjt. now moved for a rule calling on the Plaintiff to shew cause why this verdict should not be set aside and a new trial be had, on the ground of the damages being excessive, and because the jury ought not to have been directed to exclude from their consideration those circumstances which tended to shew the necessity of that punishment being inflicted which was the cause of the action; for that although the Plaintiff might perhaps be entitled to some damages, since the circumstances alluded to did not amount to a legal defence, yet the Defendant had a right to the benefit of those circumstances by way of mitigation (*a*).

But

(*a*) Upon this subject there seems to be some contradiction in the books. Thus in *assumpsit* and *non-assumpsit* pleaded, a discharge was admitted in evidence by *Hale* Ch. J. in mitigation of damages; though he said that *exoneravit* ought to have been pleaded. *Abbot v. Chapman*, 2 *Lev.* 81. In like manner a release was admitted, *Buckford v. Clarke*, 1 *Sid.* 236. And *Holt* Ch. J. in case for words allowed the truth of the words to be given in evidence in mitigation of damages. *Smithies v. Dr. Harrison*, 1 *Ld. Ray.* 727. But the more reasonable rule seems to have been laid down by *Price* Baron, in a case of *Dennis v. Pauling*, 2*n. Do.* 1716. *Vin. Abr.* iii. *Evidence*, (l. b.) pl. 16. who in case for words refused to admit any thing in evidence which tended to justify the words, though in mitigation of damages only; saying, "that any thing which tended to shew a provocation or any transaction between the parties

giving occasion for speaking the words was proper in the Defendant to make out, because these matters cannot be pleaded." Indeed so early as 21 *Fl.* 8. in trespass *quare clausum fregit* and not guilty pleaded, where the Defendant offered to give in evidence that the trespass was committed by his cattle through the default of the Plaintiff's fences, and this evidence was rejected because the matter ought to have been pleaded, the Defendant's counsel urged that it might be received in mitigation of damages; but *Shelley* J. would not allow it, lest the jury should be induced to find a verdict contrary to law, and thereby incur an attainder. *Kilw.* 203. *b.* Subsequent to the case of *Smithies v. Dr. Harrison*, viz. in *Mich.* 17 *Geo.* 2. *Lee* Ch. J. refused to allow the truth of words spoken to be proved in mitigation of damages, saying that at a meeting of all the judges, a large majority of them had determined not to allow it in

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But *The Court* were of opinion that his Lordship's direction was perfectly right in point of law, and that it did not appear from the report, that the damages given by the jury were excessive.

Shepherd took nothing by his motion.

future, but that it should be pleaded, and that this was now a general rule. *Underwood v. Parks*, 2 *Sir.* 1200. In support of that part of the proposition laid down by *Price* Baron, that what cannot be pleaded may be given in evidence, the case of *Coot v. Barty*, 12 *Mod.* 232. may be referred to,

where it was said, that in trespass for criminal conversation with the Plaintiff's wife, licence of the husband or the bad character of the wife could not be pleaded in bar, but that those matters might be given in evidence in mitigation of damages.

June 21st.

MARSH v. HUTCHINSON.

An Englishman employed in the service of the British Government, residing in a foreign country and having lands there, upon the cessation of his employment in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad, himself. Held that the wife not having represented herself as a *feme sole* was not liable to be sued as such.

THIS was an action for goods sold and delivered by the Plaintiff to the Defendant. Plea *non assumpsit*.

The cause was tried before *Marshall* Serjt. at the summer assises for *Norfolk* 1799: the Plaintiff's demand was for coals supplied to the Defendant during the last three or four years, and the defence was coverture. It appeared that the Defendant's husband was an *Englishman*; that in 1783 he left this country, and had occasionally been here since that period; but that about ten years ago having purchased the appointment of agent for the *English* packets at the *Brill* in *Holland*, he had resided there ever since; that he was possessed of madder grounds in that country, from the cultivation of which he derived considerable profit; that on the irruption of the *French* into *Holland* in 1795, his employment as agent having ceased, he sent the Defendant together with his wife and family to reside in this country, but remained himself in *Holland* to look after his madder grounds, and also with a view to recover his situation if the intercourse between *England* and *Holland* should be re-established; that the Defendant lived at *Aylsham* in *Norfolk*, and was there considered to be a married woman. Upon this the Plaintiff's counsel insisted that the Defendant's husband being domiciled in a foreign country from which he was not likely to return, the Defendant must be treated as a *feme-sole*, and therefore capable of making contracts to bind herself. The learned Serjeant directed the jury to ascertain the amount of the de-

mand;

mand ; but conceiving that the Defendant had sufficiently proved her coverture, and that her husband's residence in *Holland* did not, under all the circumstances, enable her to bind herself by her own contract as a *feme-sole*, nonsuited the Plaintiff, with liberty to move to set that nonsuit aside, and enter a verdict for the Plaintiff to the amount ascertained by the jury.

Accordingly in *Michaelmas* term last a rule *nisi* having been obtained for that purpose,

Sellon Serjt. shewed cause, and after observing that the cases respecting coverture might be divided into two classes, first, that of separate maintenance secured to the wife ; secondly, that which proceeded on the old exceptions of abjuration, and exile ; said, that he should dismiss the consideration of the former altogether : with respect to the second class he argued, that the principle on which they proceeded was, that the husband had it not in his power to return to this country. *Margery Weyland's case*, *Ryley, Plac. Parl.* 66. *Lady Maltraver's case*, 10 *Ed.* 3. 53. *Sybell Belknap's case*, 1 *H.* 4. 1. *a.* *Countess of Portland v. Producers*, 2 *Vern.* 104. *Sparrow v. Carruthers*, cited 2 *Bl.* 1197. 1 *T. R.* 7. He observed that the more modern authorities had been determined on the foundation of a case, upon which more stress had been laid than it deserved ; namely, *Deerly v. the Duchesse of Mazarine*, 1 *Salk.* 116. 2 *Salk.* 646. ; for that in fact that case was not decided on a principle of law but on an equitable point of practice : the reporter himself having entitled it in the margin, " New Trial not granted for mistake in point of law, against the equity of the case ; " that it was also thrown out there that the husband was an alien and that a divorce might be intended, and indeed Lord *Camden* in the case of *Goslin v. Wilcock*, 2 *Wils.* 308. had declared, that " the jury in the case of *Deerly v. the Duchesse of Mazarine* were liable to an attain ; " that moreover in *Walford v. Duchesse de Pienne*, *Esp. Cas. N. P.* 554. *Franks v. Duchesse de Pienne*, *ib.* 587. and *De Gaillon v. L'Aigle (a)*, the distinction was taken that the husband was an alien ; that in those cases there was a complete desertion of the kingdom by the husband, and no *animus revertendi* to be presumed ; whereas the husband in the present case being an *Englishman*, must be presumed to have the *animus revertendi*.

(a) *Ante*, 1 vol. 357.

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Leas Serjt. *contra* argued, that as in this case it did not appear that the Defendant on the one hand represented herself as a single woman, or that the Plaintiff on the other knew the circumstances of her situation, the question, Whether the latter were entitled to sue the former as a single woman? must depend upon a sound construction of that modification of the rule of law, that a *feme-covert* cannot be sued, which had already prevailed; that the first class of cases alluded to on the other side, proved that the general rule of law was subject to modification; and that the second class of cases, some of which were as ancient as the time of *Edward* the first, were in principle directly applicable to the present; that principle being, that where the husband is beyond the process of the Courts and therefore not amenable to them, the rule of law ceases, that the liability of the wife is transferred to the husband; that though in *Deerly v. the Ducheſs of Mazarine* one point decided was, that the Court would not grant a new trial against the equity of the case, yet that another principle to be drawn from that case is, that the wife of a person not within the reach of the law is liable to be sued; that on the same principle proceeded the more modern cases of *Walford v. Duchesse de Pienne*, *Franks v. Duchesse de Pienne*, and *De Gaillon v. L'Aigle*; that whether the husband be a foreigner or an *Englishman* can make no difference, provided he be beyond the jurisdiction of the Court; that it mattered not whether the absence of the husband be for life or a shorter period, since it appeared both from *Belknap's* case and from *Sparrow v. Carruthers*, that a temporary suspension of the capacity of the husband to be sued, restored to the wife her liability for her own contracts; that the mere circumstance of the husband, in this case, being an *Englishman*, could not raise the presumption of an *animus revertendi*, he having been so long absent, having purchased property in *Holland*, and being domiciled there; and that such a presumption, if it could be raised, would be rebutted by his having made his election to remain in *Holland*, at the time when he found it necessary for temporary security to send his wife and family to *England*.

Lord ELDON Ch. J. Suppose an *Englishman* going over to *Holland*, and residing there as agent for the *British* packets, should continue engaged in that single employment for 20 years, and should then die there, is it clear that his personal effects ought to be distributed according to the law of *Holland*? In the case of

Bruce.

Bruce v. Bruce (a) which I argued in the House of Lords, the question was, Whether the personal estate of a *Scotman* who had died

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(a) The Reporters have been favoured with the following note of that case.

(In the House of Lords.)

Elizabeth and Margaret Bruce daughters of *David Bruce*, deceased, and *James Hamilton* husband of the said *Margaret*, Appellants.

James Bruce, Respondent, April 1790.

William Bruce, son of the late Mr. *Bruce* of *Kinnaird*, left *Scotland* when young, and was for some years in the navy. In 1767, he went to the *East Indies* in the military service of the company, and continued there till his death in 1783, having risen to the rank of a major. In many letters to his friends in *Scotland* he expressed an anxious desire to return and spend the remainder of his life in his native country; particularly he wrote to that purpose a few months before his death, and he was in the course of remitting home his money, meaning soon to follow it himself, when he died. At that time a part of his fortune was in the hands of people in *England*, and he had remitted a considerable sum to his attornies in *Scotland*, in bills on the *India* company which were on the way home at the time of his death. Having made no will, the question arose, Whether his effects were to pass according to the distribution of the law of *England*, in which case Mr. *Bruce* of *Kinnaird*, his brother of the half blood would have a share; or the law of *Scotland*, which prefers the whole blood exclusively. It was insisted by Mr. *Bruce*, that according to a long train of decisions in the Court of Session [1], (with an exception in the year 1744,) [2] the law of the place where the effects are situated is the rule, and he contended that here the money was

either actually in *England* or in bills due by the *English East India* company; and even if the domicile of the deceased be the rule, major *Bruce* was at the time of his death domiciled in *India*, a country subject to the laws of *England*. On the other hand, the brother and sisters of the full blood pleaded, that according to the *Law of Nations*, adopted in cases of this kind by all the countries of *Europe*, and by the civil law, the distribution of the personal estate of an intestate is to be governed by the law of the place where he had his domicile, and that a man could not have a domicile, but at a place where he had taken up residence with intention to remain; that major *Bruce* never intended to remain in *India*, and had no fixed habitation there, and therefore *Scotland*, where he was born, and to which he expressed his resolution to return, and was actually preparing to go, was his country, and in the eye of law the place of his domicile all along. The Lord Ordinary (Lord *Monboddo*) pronounced the following interlocutor: " Finds, 1mo, That as major *Bruce* was in the service of the *East India* Company, and not in a regiment on the *British* establishment which might have been in *India* only occasionally, and as he was not upon his way to *Scotland* nor had declared any fixed and settled intention to return thither at any particular time, *India* must be considered as the place of his domicile. 2do, That as all his effects were either in *India* or in the hands of the *East India* Company, or of others his debtors in *England*, though he had granted letters of attorney to some of his friends in *Scotland*, empowering them to uplift those debts, his *res sitæ* must be considered to be in *England*: therefore finds, that the *English* law must be the rule in this case for determining the

[1] The authorities in the *Scots* law referred to were *Henderson's Bairsn Durie*, 88. *Melville v. Drummond Durie*, 723. *Sikow v. Lewins*, 1 *Stair's Decisions*, 252. *Brown and Duff v. Bizet*, 1 *Stair's Dec.* 398. *Dirlton's Dec.* 10. *S. C. Brown v. Brown*, Lord *Kilkerran*, voce *Foreign*, fol. 199. *Falconer*, 11. *S. C. Morrison v. Sutherland*, Lord *Kilkerran*, voce *Foreign*, fol. 209. *Mortimer v. Lorimer*, *Erskine's Institute*, fol. 601. in *notis*. ed. 1773. *Davidson v. Elcherfon*, *Faculties Collection*, 13th January 1778. *Maclean v. Henderson*, *ibid.* *cod. dic.* *Erskine's Institute*, B. iii. tit. 9. s. 4. Lord *Kaim's Prime. of Equity*, B. iii. c. 8. s. 4. The authorities in the *Law of Nations* referred to in the above case, are collected in *Hunter v. Potts*, 4 *T. R.* 184. in *notis*; in the argument of which last case may also be found the authorities in the *Law of England* which bear upon the subject.

[2] *Brown v. Brown*.

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died in the *East Indies*, in the service of the company, should be distributed according to the law of *Scotland*, which was his *domicilium*

succession of major *Bruce*, and consequently that *Janes Bruce* of *Kinnaird* is intitled to succeed with the defenders his brother and sisters *consanguinean*; and decerns and declares accordingly."

The Court of Session having affirmed the Lord Ordinary's interlocutor, the children of the full blood entered their appeal.

After counsel on both sides had been heard, the Chancellor (Lord *Furber*) spoke to the following effect: "That as he had no doubt that the decree ought to be affirmed, he would not have troubled their Lordships by delivering his reasons, had it not been pressed with some anxiety from the bar, that if there was to be an affirmance the grounds of the determination should be stated, to prevent its being understood that the whole doctrine laid down by the interlocutor appealed from, and particularly that on which it was said the judges of the Court of Session proceeded principally in this and former cases similar to it, had the sanction of this House. It had been urged that the judgment should contain a declaration of what was the law, and he had revolved in his own mind whether that would be expedient. It was not usual in this House, or in the courts of law, to decide more than the very case before them, and he had particular reluctance to go farther in the present case, because, as had been stated with great propriety by one of the Respondent's counsel, various cases had been decided in *Scotland* upon principles, which if this House were to condemn, a pretext might be afforded to disturb matters long at rest. But he could have no objection to declare what were the grounds of his own opinion, and how far he coincided with the rules laid down by the Court below. Two reasons were assigned for having declared that the distribution of major *Bruce*'s personal estate ought to be according to the law of *England*: 1st, That *India*, a country subject to that law, was to be held as the place of his *domicilium*, and certain circumstances were mentioned from whence that was inferred: these he considered only as circumstances in the case, and not as necessary circumstances; that is, though these had been

wanting, the same conclusion might have been inferred from other circumstances. In his mind, all the circumstances in major *Bruce*'s life led to the same conclusion. The 2d reason assigned by the interlocutor was, That the property of the deceased, which was the subject of distribution was, at the time of his death, in *India* or in *England*. As to this he founded so little upon it, that he professed not to see how the property could be considered as in *England*. It consisted of debts owing to the deceased, or money in bills of exchange drawn on the *India* Company. Debts have no *situs*, they follow the person of the creditor. That proposition in the interlocutor therefore fails in fact. But the true ground upon which the cause turned was, the deceased being *domiciled* in *India*. He was born in *Scotland* but he had no property there. A person's origin in a question of, Where is his *domicile*? is to be reckoned as but one circumstance in evidence which may aid other circumstances; but it is an enormous proposition that a person is to be held *domiciled* where he drew his first breath, without adding something more unequivocal. A person's being at a place is *prima facie* evidence that he is *domiciled* at that place, and it lies on those who say otherwise to rebut that evidence. It may be rebutted no doubt. A person travelling;—on a visit;—he may be there for some time on account of his health or business;—a soldier may be ordered to *Flanders*, and be detained at one place there for many months;—the case of ambassadors, &c. But what will make a person's *domicile* or home, in contradiction to these cases must occur to every one. A *British* man settles as a merchant abroad; he enjoys the privileges of the place; he may mean to return when he has made his fortune, but if he dies in the interval, will it be maintained that he had his *domicile* at home? In this case major *Bruce* left *Scotland* in his early years; he went to *India*; returned to *England*, and remained there for two years without so much as visiting *Scotland*, and then went again to *India* and lived there sixteen years and died. He meant to return to his native country

cilium originis, or of the province of *Canterbury* which extends to the *East Indies*? Lord *Thurlow* in his judgment adopted this distinction; that if he had gone out in a King's regiment, and died in the King's service, his *domicile* would not have been changed; but that having died in the service of the company, it was changed. Had the Defendant's husband been engaged in the service of government only, it might have made a material difference in the case. The question however in the view of the law may perhaps be reduced to this, Whether the Defendant's husband having been employed in *Holland* by the *British* government, he has remained there after the cessation of that employment merely to collect what the civilians call *summas rerum*, or with any further views? And yet if it were clear that this man never intended to return to *England*, and might therefore be represented as incapable of being sued in this country, before we come to a conclusion upon the case, there are many considerations to be weighed. In the case of abjuration, and in those other cases which amount to a civil death, I think that I understand the situation in which the wife was placed. The husband being civilly dead, the wife was entitled to dower of his land in the same manner as if he were actually dead (a); so she became entitled to the enjoyment and

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country it is said, and let it be granted; he then meant to change his *domicile*, but he died before actually changing it. These (his Lordship said) were the grounds of his opinion, though he would move a simple affirmance of the decree, but he would not hesitate as from himself, to lay down for law generally, That personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his *domicile*; for, the actual *situs* of the goods has no influence. He observed that some of the best writers in *Scotland* lay this down expressly to be the law of that country; and he quoted Mr. *Erskine's Institute* as directly in point. In one case it was clearly so decided in the Court of Session, and in the other cases which had been relied on as favouring the doctrine of *lex loci rei sitæ*, he thought he saw ingredients which made the Court, as in the present case, join both *domicilium* and *situs*. But to say that the *lex loci rei sitæ* is to govern though the

domicilium of the deceased be without contradiction in a different country, is a gross misapplication of the rules of civil law and *jus gentium*, though the law of *Scotland* on this point is constantly asserted to be founded on them."

Decree accordingly affirmed simply.

(a) This is supported by the authority of *Bracton*, lib. 4. *Tract.* 6. c. 7. fo. 301. b. *Britten*, cap. 106. fo. 251. and *Flota*, lib. 5. cap. 28. In these books the wife seems to have been considered as equally entitled to dower in the case of a civil as of a natural death. With respect to entering into religion, they treat the wife as dowable where the husband is actually professed, though not where he is in a state of probation only; and lay it down that the fact of profession in such case must be tried by the certificate of the ordinary. It was said, however, in *M. 32 Edw. 1. Fitz. Abr. tit. Dower*, pl. 176. by *Bersford*, that although the husband be professed, the wife shall not have her dower until his natural death; this doctrine

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and profits of her own land, though if he had not been civilly dead, he would have been seised of the lands in her right (a): and indeed she might have sued for an assault in her own name, and might have been made a Defendant without her husband, in all cases in which the husband must otherwise have been joined. In those cases there is no difficulty, because the fiction of law which considers the husband as civilly dead, puts the wife in the same situation as if he were actually dead. With respect to the more modern cases, in which a separate maintenance has been secured to the wife, or in which the husband has left the kingdom either with or without the power or intention of returning, and in which the wife has been held capable of suing and being sued alone, I wish to know to what extent the principle goes on which they have proceeded: whether under such circumstances a married woman is to be considered as a *feme sole* on a principle which stops short at a matter of contract, or on a principle which goes to a greater extent and obliges us to consider her as a *feme sole* to all intents and purposes. Undoubtedly, the policy of the law which has considered a married woman as incapable of being called upon separate from her husband, admits of some modifications arising from particular circumstances. When the husband is banished he is considered as civilly dead: but transportation

has been adopted in *F. N. B.* 150. *F. Co. Litt.* 33. b. 132. b. *Perkins, Sess.* 307. *Hale's MSS. Co. Litt. Book 1. Note 205. Ed.* 15. and *Gilbert. Treat. on Dower in Law of Uses*, 401. The reason assigned in most of these books is, that the wife, by withholding her consent, might prevent her husband from becoming professed: Lord Chief Baron *Gilbert* treats profession as a separation, not a dissolution of the marriage, and observes, that although the ecclesiastical law gave alimony during the life of the husband, yet she could have no separate interest by way of dower while the marriage continued. Sir *Edward Coke*, indeed, (*1 Inst.* 33. b.) goes so far as to lay it down generally, that dower arises on the natural, not on the civil death of the husband. This *dictum*, however, he no otherwise supports than by instancing the case of profession, which exception, if well founded, seems to proceed upon reasons not altogether applicable to the cases of abjuration and exile. With respect to abjuration for felony,

though the dower of the wife was originally forfeited by the attainder with which it was attended, yet as the 1 *Ed. 6. c. 12.* removed that forfeiture, it should seem that between that time and the 21 *Jac. 1. c. 28.* which abolished the privilege of sanctuary and consequently put an end to abjuration altogether, the wife might have been entitled to dower on this civil death of the husband. Supposing this to have been the case, the same consequence would naturally ensue a transportation for life at the present day.

(a) So a jointress was entitled to her jointure upon the abjuration of her husband, *Margery Weyland's* case; so if the husband aliened the land of the wife, and afterwards abjured the realm, she might have had a *cui in vita. Co. Litt.* 133. a. But in the case of profession, if the wife aliened the land which was in her own right, and then deraigned her husband, he might enter and avoid the alienation. *Hil. 33, Ed. 3. Fitz. Ab. tit. Entrè congeable*, pl. 52. *Co. Litt.* 132. b.

for a term of years may give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal. But besides the difficulties which might arise during the term of the transportation, another difficulty of equal importance occurs where the wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country. The case before us must be decided on some principle which will govern such a case as that. Though the case of *Sparrow v. Carruthers* was decided by Mr. Justice Yates, (a name that will be illustrious as long as the law of *England* remains,) yet as far as his opinion can be collected, he seems to have treated it as a material circumstance in evidence, that the time of the transportation was not out; and he does not give any opinion as to what would have been the situation of the parties if it had been out. We cannot presume to say how he would have decided had the husband continued to reside abroad after the period of his transportation had expired, or had only remained there to collect his affairs with a view to return to this country when he had so done.

HEATH J. There is a great difference between the cases of an *Englishman* residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the King's privy seal; but in the old cases of banishment and abjuration, as well as in the more modern one of transportation, the husband could not return, as it would have been contrary to law. There is no case in which the wife has been held liable, the husband being an *Englishman*.

As the case of *Marshall v. Mary Rutton*, 8 T. R. 545. in which it was expected that the whole doctrine respecting the liability of a *feme covert* to be sued would be fully discussed, was then pending before the twelve judges, the Court desired that this case might stand over until that had been determined.

And on this day Lord *Eldon* Ch. J. said, that after all the discussion which the doctrine had undergone, the Court could see nothing to induce them to think that the direction given to the jury in this case was wrong.

Per Curiam,

Rule discharged.

1800.
MARSH
v.
HUTCHIN-
SON.

1800.

June 25th.

FAIR V. PICKFORD.

In *assumpsit* against a carrier for goods spoiled, the Defendant was not allowed to pay the invoice price into Court.

THIS was an action of *assumpsit* brought against the Defendant as a carrier to recover the loss sustained upon a quantity of tea, which had been put on board the Defendant's barge to be carried from *London* to *Liverpool*, and which had been spoiled in consequence of the barge being sunk. The Defendant offered to pay for the damaged tea at the invoice price: the Plaintiff contended that he was entitled to more than the invoice price, on account of an alteration respecting the allowance of trett adopted by the *East India* Company since the invoice was made out.

Shepherd Serjt. now moved on the part of the Defendant, that he might be allowed to pay the invoice price into Court. He contended that as the Defendant admitted that a specific sum was due, and the only question between the parties was, Whether he were liable to any thing *ultra* that sum or not? The Plaintiff ought not to be allowed to litigate that question without the risk of being subject to costs in case of failure. He relied on *Hutton et Ux. v. Bolton*, 1 *H. Bl.* 299. *in notis*, where in an action against a carrier who had advertised that he would not be liable beyond 20 *l.* unless paid for in proportion to the risk, he was permitted to pay the 20 *l.* into Court: and he said that the present case was not an action on a mere tort like *Bowles v. Fuller*, 7 *T. R.* 335. and *Salt v. Salt*, 8 *T. R.* 47. but was *quasi ex contractu*.

Lens Serjt. shewed cause in the first instance, and insisted that the Plaintiff's demand in this case was for damages altogether uncertain; that no part of that demand was distinguishable from the rest; that the rule established by the case of *Hallet* and others v. the *East India* Company, 2 *Burr.* 1120. was, "that where the sum demanded is a sum certain, or capable of being ascertained by mere computation without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the Defendant to pay money into Court;" and that the same principle was adopted in *Hutton et Ux. v. Bolton*, for the Court there held that the demand was substantially for a specific sum. But in the present case, he said, the Plaintiff demanded an adequate compensation for the injury sustained, which compensation was to be ascertained by the jury; and though the Defendant admitted a particular mode of estimating that compensa-

tion, and offered to pay a sum of money calculated accordingly, yet that sum of money formed no part of the Plaintiff's demand, which was for a compensation to be calculated according to such mode as the jury should adopt. He also referred to the cases of *Bowles v. Fuller* and *Salt v. Salt*, the former of which was an action against the sheriff for a false return, and the latter an action for dilapidations, in both of which it was held that money could not be paid into Court.

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 v.
 PICKFORD.

HEATH J. (*absente* Lord Eldon Ch. J.) If we could find any principle upon which this application could be allowed, we should be very well inclined to grant it. But the Courts have not gone so far as to allow money to be paid in, in cases of uncertain damages. Where there is any contract between the parties upon which the Court can rest, it may be done: but in this case there is no such contract. Suppose an action on the case were brought for negligently driving a carriage, in consequence of which the Plaintiff's leg was broken, could the Defendant pay into Court the amount of the surgeon's bill?

Rooke and *Chambre* Js. expressed a strong desire to accede to the application, but observed that it could not be done without violating the principle which had been established as the rule upon this subject.

Shepherd took nothing by his motion (a).

(a) "The true grounds on which rules for | are accurately stated in *Tidd's Pract.* 408.
 payment of money into Court are granted, | ed. 1. 537. ed. 2." *Per Grose* J. 8 T. R. 49.

PINERO v. WRIGHT.

June 25th.

SHEPHERD Serjt. moved to set aside the *capias ad respondendum*, which had issued against the Defendant as bail, for irregularity. The supposed irregularity was, that the *capias ad respondendum* against the Defendant was *teste'd* of a day preceding that on which the *capias ad satisfaciendum* against the principal was returned. He contended that as the bail are not liable to be sued until the *capias ad satisfaciendum* has been returned, it appeared upon the very face of the process in this case that it had been sued out too soon.

A *capias ad respond.* against bail was *teste'd* of a day prior to the return of the *ca. sa.* against the principal, but was not in fact sued out till afterwards. Held regular.

Bayley Serjt. stated, that in point of fact the *capias ad respondendum* did not issue until after the *capias ad satisfaciendum* had

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been returned, and that the circumstance of its being *teste'd* of a day anterior to that time was not material, since the Plaintiff was at liberty to shew the time when it really issued.

The Court (absente Lord Eldon Ch. J.) said, that no inconsistency would appear on the record (a), and that there was no irregularity in the Plaintiff's proceeding.

Shepherd took nothing by his motion.

(a) Vide *Davis v. Owen*, ante, vol. 1. p. 343.

June 2, 11.

MARIA v. HALL.

The Court will not compel a prisoner of war who sues for wages earned on board an *English* ship, to give security for costs.

SHEPHERD Serjt. moved for a rule to shew cause why the proceedings in this case should not be stayed until the Defendant should give security for costs. The Plaintiff was a *French* prisoner of war confined in the prison at *Liverpool*, and had brought this action against the Defendant as master of a ship, to recover a compensation for working the ship home from the *West Indies*. He contended that the case of a prisoner of war was different from the common case of a foreigner resident in this country (a).

But *HEATH J.* observed, that it had been determined that a prisoner of war may maintain an action on a contract for wages (b).

And *the Court (absente Lord Eldon Ch. J.)* rejected the application.

Shepherd took nothing by his motion.

(a) Vide *Porrier v. Carter*, 1 H. Bl. 106.

(b) *Sparenburgh v. Bannatyne*, ante, vol. 1. p. 163. Indeed the Court having determined in *Henschen v. Garves*, 2 H. Bl. 383. and *Jacobs v. Stevenson*, ante, vol. 1. p. 96. that a foreigner serving on board an *English* ship is not compellable to give security for costs, and in *Sparenburgh v. Bannatyne*, that

a prisoner of war may maintain an action for wages, there seems to have been less reason for calling upon the present Plaintiff to give security who was actually within the kingdom, than on any foreign seaman serving out of the kingdom on board an *English* ship.

1800.

ANDERSON Administrator, &c. v. MAY.

June 28th.

THIS action was brought for business done as an attorney by the Plaintiff's intestate at the instance of the Defendant. At the *Westminster* sittings in this term the cause was tried before Lord Eldon Ch. J. when in order to prove the amount of the bill, the Plaintiff gave in evidence a copy of a bill delivered to the Defendant in 1796, and which had never been referred for taxation. The Defendant objected to this being received in evidence, inasmuch as no notice had been given to produce the bill delivered to the Defendant. But his Lordship held that it ought to be received, and was conclusive as to the reasonableness of the charges (a), it being the Defendant's own fault that the bill had never been taxed. A verdict was accordingly found for the Plaintiff, and the point made by the Defendant reserved for the opinion of the Court.

A copy of an attorney's bill, the original of which has been delivered to the Defendant, may be admitted in evidence without proof of notice to produce the original: and is conclusive as to the reasonableness of the items.

Heywood Serjt. now moved to set aside the verdict and have a new trial, contending that the rule was clear that no copy can be received in evidence until a notice has been given to produce the original; that this case was distinguishable from *Jory v. Orchard* (b), because here the bill was not delivered by way of notice of action, but in the usual way only, as a demand of so much money due; that the Court in the above case relied on the circumstance of the paper read in evidence being a duplicate original, and referred to the analogous case of a notice to quit, a copy of which is usually received; whereas that practice, he observed, was not founded on any authority and was contrary to principle.

But *The Court* said, that it was the constant practice to receive a copy of this kind in evidence, and observed, that it was not a stronger case than *Jory v. Orchard*.

Heywood took nothing by his motion.

(a) Vide *Loveridge v. Escham*, ante, vol. 1. p. 49. also *Knox v. H'balley*, *Esq.* N. P. Cas. 159.

(b) *Ante*, p. 39.

1803.

June 28th.

SAUNDERSON v. JACKSON and Another.

A bill of parcels in which the vendor's name is printed, delivered to the vendor at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of the contract within the statute of frauds. At all events, a subsequent letter written and signed by the vendor referring to the order, may be connected with the bill of parcels, so as to take the case out of the statute.

THIS was an action on the case against the Defendants for not delivering 1000 gallons of gin to the Plaintiff within a certain time, according to a bargain entered into between them. There was a second count for not delivering within a reasonable time.

The cause was tried before Lord *Eldon* Ch. J. at the *Guildhall* sittings after last *Easter* term, when the contract for the delivery of the gin having been proved on the part of the Plaintiff, the Defendants insisted that the case was within the statute of frauds, inasmuch as there was no note or memorandum in writing of the bargain. The circumstances were as follow: At the time the order for the gin was given by the Plaintiff to the Defendants, a bill of parcels was delivered to the former, the printed part of which was, "*London. Bought of Jackson and Hankin, distillers, No. 8, Oxford-street,*" and then followed in writing, "1000 gallons of gin, 1 in 5. gin 7*l.* 350*l.*" About a month after the above period the Defendants also wrote the following letter to the Plaintiff: "Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are, your humble servants, *Jackson and Hankin.*"

On this evidence his Lordship directed the jury to find a verdict for the Plaintiff, reserving the point made for the consideration of the Court.

Accordingly *Lens* Serjt. having on a former day obtained a rule *nisi* for setting aside this verdict and entering a nonsuit, he was now called upon to begin in support of his rule. He observed that the words of the 29 *Car. 2. c. 3. s. 17.* require that "some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised;" and that in *Hawkins v. Holmes*, 1 *P. Wms.* 770. and *Stokes v. Moore*, *ib.* in the notes by Mr. *Cox*, the Court had held a signing by the party necessary, though the draught of the conveyance had in the former case been altered in the hand-writing of the purchaser, and in the latter,

latter, the seller had himself written instructions for the renewal of a lease. He contended, that though the printed name contained in the bill of parcels might have amounted to a signature within the meaning of the act, if the bill of parcels had been intended to express the contract *quasi* a contract, yet that in this case it had not been delivered to the Plaintiff with that view; that the contract itself had never been reduced to writing or ever was intended to be so; and therefore the bill of parcels could only operate as evidence of a contract previously entered into; and that the subsequent letter of the Defendants, though signed by them, could not be treated as a note or memorandum of the contract, being accidental and only a reference to a pre-existing contract.

Shepherd Serjt. contra was stopped by the Court.

Lord ELDON Ch. J. This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, Whether if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the Defendants, I think the case is clearly taken out of the statute of frauds. For although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the Defendants, there is then a written note or memorandum of the order which was originally given by the Plaintiff signed by the Defendants. It has been decided (a) that if a man draw up an agreement in his own handwriting, beginning "I A. B. agree, &c." and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract.

Per Curiam,

Rule discharged.

(a) *Knight v. Cuckford. Esp. N. P. Cas.* 1800. So it has been held that if a will of lands begin "I John Stanley make this my

"last will, &c." it need not be otherwise signed to make it valid within the statute of frauds: *Lemayne v. Stanley*, 3 Lev. 1.

1800.
SAUNDER-
SON
v.
JACKSON
and Another.

1800.

June 28th.

PAGE v. FRY.

In a declaration on a policy of insurance the Plaintiff averred that Messrs. H. at the time of effecting the policy and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured. Held that the averment was supported by the evidence.

THIS was an action on a policy of insurance on the ship *Margaret* and a cargo of corn, at and from *Dundee* to *Chichester*, effected by the Plaintiff as agent of Messrs. *Hyde* and *Hobbs*. In the declaration it was averred, "that certain persons using trade and commerce under the style and firm of Messrs. *Hyde* and *Hobbs*, were at the time of loading the said corn on board the said ship as aforesaid and at the time of subscribing the said writing or policy of insurance, and from thenceforth until the time of the loss hereinafter mentioned interested in the said corn to a large amount, to wit, to the amount of all the money ever insured thereon, and that the said writing or policy of assurance so made in the name of the Plaintiff, was made to and for the use, risk, benefit, and account of them the said Messrs. *Hyde* and *Hobbs*, to wit, at, &c."

At the trial before Lord *Eldon* Ch. J. at the *Guildhall* sittings after last *Easter* term, it appeared in evidence that Messrs. *Hyde* and *Hobbs* who were merchants at *Chichester*, had, through the agency of the Plaintiff, purchased a certain quantity of corn on their own account; that on the 27th of *December* 1798, they informed the Plaintiff by letter, that thinking the engagement might perhaps be too large for themselves, they had offered another house of the name of *Hacks* a joint concern in the corn, which the latter had accepted; and at the same time directed the Plaintiff to effect an insurance on the cargo, which he accordingly did on the 28th *January* 1799. The invoices were made out to *Hyde* and *Hobbs*, and payment for the cargo was made by them. It was objected on the part of the Defendant, that the evidence contradicted the averment in the declaration, that the whole interest in the cargo insured was in Messrs. *Hyde* and *Hobbs*. His Lordship directed the jury to find a verdict for the Plaintiff, but gave leave to the Defendant to move for a nonsuit.

Accordingly a rule *nisi* for that purpose having been obtained upon a former day;

Lens Serjt. now shewed cause. The whole question in this case is, Whether the variance between the averment of interest in the declaration

ration and the interest proved be material? Under the 19 Geo. 2. c. 37. it is undoubtedly necessary that the party for whom the policy is effected should be really interested, and it has been the practice since that statute to aver the interest. It seems however to be doubtful whether it be necessary so to do: the effect of the statute is not to make any additional averment in the declaration necessary, but only to throw upon the Plaintiff the burthen of proving that the parties for whose benefit the policy is made are interested within the meaning of the statute. In this case the objection is not that Messrs. *Hyde* and *Hobbs* are not interested, but that their interest is not properly averred. If then the averment in question were unnecessary, it will not prevent the Plaintiff from recovering, being alleged under a *scilicet*; for as it does not relate to matters that are part of the contract, it is not to be considered as a material averment (a). At any rate this averment need not be construed so strictly as to exclude the interest of all other persons besides Messrs. *Hyde* and *Hobbs*. The substantial part of the averment is, that Messrs. *Hyde* and *Hobbs* were interested to a large amount, and indeed the other party who was partly interested with them had only an equitable claim on the proceeds. • The *prima facie* interest is in those persons who paid for the cargo. In *Page v. Rogers, Park. Insur.* 402. it was averred that the Plaintiff was possessed of one-third of the ship insured, and it appearing that he had at one time purchased the whole ship, it was objected that as there was no evidence of his having since parted with two-thirds, the allegation was not made out; but Lord *Mansfield* over-ruled the objection.

Shepherd and Best Serjts. contra. Whether under the 19 Geo. 2. it be necessary to aver the Plaintiff's interest, is not the question here; but the objection is, that the Plaintiff has stated upon the record that an interest exists in certain persons in whom it is not, and that having so stated it upon record, he ought to have proved it. The true way of determining whether an unnecessary averment need be proved, is to consider whether if referred to the Prothonotary it could be struck out as impertinent. *Brislow v. Wright, Doug.* 667. In *Hare v. Cater, Cowp.* 766. where it was averred that the Defendant was assignee of all the premises, and it turned out that he was assignee of a part only, the variance was held fatal. Now the necessary construction of this averment is, that the exclusive interest was in Messrs. *Hyde* and *Hobbs*. It

(a) *Frith v. Gray*, cit. in the note to *Drewry v. Twist*, 4 T. R. 561. and *Peppin v. Solomon*, 5 T. R. 496.

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can make no difference in the case whether Messrs. *Hyde* and *Hobbs* purchased the cargo in their own name for others, or having purchased it on their own account they afterwards admitted others to a joint concern in it; now in the former case it is clear that if interest were averred to be in themselves, the variance would be fatal. The parties whom they admitted into the concern may be considered as partners in the transaction; they might have insured their proportion as such, and might have averred their interest in that proportion. The averment of the Plaintiff therefore which excludes the interest of any person except Messrs. *Hyde* and *Hobbs* is untrue (a).

LORD ELDON Ch. J. The question is, Whether Messrs. *Hyde* and *Hobbs* had such an interest in the whole cargo as will support the averment in question? An insurable interest is a very different interest from most others that can be stated. In *Le Cras v. Hughes* (b) it is very certain that the party insured had no interest in the subject of the insurance according to the common understanding of the word interest; for the prize taken not coming within the terms of the act of Parliament, and consequently not within the terms of the proclamation, was completely at the disposal of the crown. In that case, as counsel for the Defendant, I pressed upon Lord *Mansfield* the authority of a case before Lord *Bathurst* assisted by Sir *Thomas Sewell*, where the next of kin of a lunatic applied to the Court of Chancery praying that the evidence of his being the next of kin might be perpetuated, and stating that he had such an interest in the estate as the Court might take notice of (c). The application however was rejected on the ground of want of interest; and yet the interest in that case would generally be understood to be much more certain than that reasonable expectation on which *Le Cras v. Hughes* was decided. So in the case of the *Dutch* commissioners (d) which was lately decided, it is very difficult to define what their interest was, and yet they were held to have an insurable interest. My opinion therefore upon this case is very clear; I think the Plaintiff had a sufficient interest throughout the intirety of this cargo, notwithstanding other persons had a beneficial interest in a part, to support the averment in this declaration.

(a) See *Perchard v. Whitmore*, ante, p. 155. in *notis*, where it seems to have been taken for granted, that if a third person had been interested in the goods jointly with the two co-plaintiffs at the time of effecting the policy, the Plaintiffs must have been nonsuited.

(b) *Park. Insur.* 269.

(c) In *Sackvill v. Ayleworth*, at the house

of Lord Chan *Nottingham* *ceram Charleton* J. the devisee of a lunatic, under a will made previous to the lunacy, having brought a bill against the heir at law to examine witnesses touching the will, in *perpetuum rei memoriam*, the bill was dismissed. 1 Vern. 106.

(d) *Crawford v. Hunter*, 8 T. R. 13.

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LEATH J. I do not see why a joint-tenant or a tenant in common has not such an interest in the intirety as will entitle him to insure. A policy made by a person so interested is not to be considered as a wager policy.

ROOKE J.—I think that Messrs. *Hyde* and *Hobbs* had such an interest in the cargo as will answer the terms of the averment.

CHAMBRE J.—The averment in substance is nothing more than that the parties for whose benefit the insurance was made, had an interest in the subject of that insurance. They are not bound by the terms of the averment to shew any thing more than that they have an interest, and if they shew an interest to the extent of one hundredth part of the cargo it will be sufficient. The spirit of the 19 *G. 2.* only requires that the policy shall not be a gaming policy.

Rule discharged.

HOLLAND v. HOPKINS.

June 30th.

INDEBITATUS assumpsit “for certain horses mares and geldings before that time sold and delivered by the Plaintiff to the Defendant.” There was also a count on a *quantum meruit*, and counts for money lent, paid, had, and received, and on an account stated. *Plea Non assumpsit.*

The cause was tried before Lord *Eldon* Ch. J. at the *Westminster* sittings after last *Easter* term, when it appeared that the Plaintiff was a horse-dealer living in the country, and the Defendant a stable-keeper in *London*; that there had been considerable dealings between them, and on an account being taken a balance was found due to the former for horses sold up to the 11th of *September* 1797 by the Defendant as agent and broker to the Plaintiff; that on or about that day the Defendant received other horses from the Plaintiff, which he afterwards sold in the same character, and received the money for them; that on this action being commenced, a bill of particulars was obtained, which stated the Plaintiff’s demand to consist of two *items*, first for money owing on an account settled and balanced for horses sold and delivered before the 11th of *September* 1797; secondly, for horses sold and delivered by the Plaintiff and his servants to the Defendant on or about the 11th of *September* 1797; that the Defendant had paid money into court generally, and in so doing had paid a few pounds more than was sufficient to satisfy what remained due upon the account balanced. It was objected by the Defendant, that the second *item* of the bill of particulars having

If a bill of particulars state the Plaintiff’s demand to be for goods sold and delivered to the Defendant, no evidence can be received of goods sold by the Defendant as agent for the Plaintiff.

stated

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stated the Plaintiff's demand to be for horses sold and delivered to the Defendant, no evidence ought to be received of a sale by the Defendant in the character of agent or broker for the Plaintiff, so as to entitle the latter to recover under the count for money had received. To this it was answered, first that the Plaintiff by his bill of particulars was only confined to the transaction respecting the horses delivered to the Defendant on or about the 11th of *September* 1797, and that he was at liberty to make any claim arising out of that transaction; and secondly, that as the Defendant had paid money into court generally the Plaintiff was at liberty to apply that money to the count for money had and received, and take a verdict for the remainder of his demand under the account stated. But his Lordship being of opinion against the Plaintiff on both points, directed a nonsuit, subject to the opinion of the Court.

Accordingly a rule *Nisi* for setting aside this nonsuit having been obtained on a former day,

Bayley and *Best* Serjts. now shewed cause, and contended, 1st, that independent of the circumstance of money being paid into Court, the Plaintiff was clearly precluded from going into evidence of a sale by the Defendant as his agent, since if it were otherwise a bill of particulars would afford the means of surprize upon the Defendant, instead of giving him notice of the case which he is to defend; that if the evidence offered by the Plaintiff were to be received merely because it related to the horses stated in the bill of particulars, it would be very difficult to draw any line; and that the Plaintiff could not suffer by being confined strictly to his bill of particulars, since if he wished to make a demand in the alternative he might have an opportunity of doing so, by stating his demand alternatively in the bill of particulars: 2dly, That if the Plaintiff were precluded by the bill of particulars from giving evidence of the transaction relative to the horses, he could not be at liberty to apply the money paid into court to the satisfaction of the demand arising out of that transaction; for though the Defendant by paying money into court generally had admitted the contract stated in the count for money had and received as well as in the other counts, yet the Plaintiff was under the necessity of shewing the amount due to him upon that contract to be equal to the sum paid in, from doing which he had precluded himself in this case.

Cockell and *Shepherd* Serjts. *contra*, insisted, that by the bill of particulars they were merely confined to the transaction relative to the horses in question; that the object of a bill of particulars is to prevent the Defendant from being surprised, by informing him of
 the

the Subject of the Plaintiff's demand, and that if a Plaintiff is prevented from going into evidence to support the different counts of his declaration by the wording of his bill of particulars, it will become necessary for him to vary the wording of his bill of particulars with as much nicety as his declaration.

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Lord ELDON Ch. J.—We are of opinion, that under the circumstances of this case this bill of particulars is not sufficiently large to let in the evidence which the Plaintiff wished to introduce. The declaration contained counts for horses sold and delivered, for money had and received, and on an account stated. It is very clear that the count for money had and received is calculated to embrace the transaction of the sale of horses on the Plaintiff's account, and to entitle him to recover the proceeds of that sale. But the defendant having applied to the Plaintiff to state the particulars of his demand, the latter informs him that it is of two sorts; 1st, For a balance on an account stated between them, and 2dly, For the price of horses sold and delivered. In consequence of this explanation the Defendant pays into court a certain sum which he acknowledges to be due upon the account stated, and considering that the rest of the declaration consists of a demand for the price of horses sold by him on account of the Plaintiff and a demand for horses sold by the Plaintiff to himself, the the former of which is abandoned by the terms of the bill of particulars, he comes prepared to say at the trial that he owes the Plaintiff nothing on his latter demand only. Will he not then be surprised if the Plaintiff should be permitted to give evidence applicable to that demand which seemed to have been abandoned? To me it appears, that a contract to repay money received on a sale of horses by commission, is as different from a contract for the absolute sale of horses to the Defendant, as a contract for the feed of the horses would be. It has been contended, that this decision will introduce great nicety into bills of particulars; but I think it would be sufficient for the bill of particulars to have stated, that on the 11th of *September* the horses in question were sent to the Defendant, and that the Plaintiff demanded the value of them or so much as they sold for. With respect to the payment of money into court, as the Defendant has admitted a balance to be due against himself, and no evidence was given applicable to the count for horses sold and delivered, he must be taken to have paid the money in on the account stated. On these grounds we think the nonsuit right.

The Court however gave the Plaintiff leave to amend his bill of particulars and go to a new trial on payment of the costs subsequent to the time of the money paid into court.

1800.

June 30th. ALLINGHAM v. FLOWER and Another, Sheriffs of London.

If after the commencement of an action of escape against the sheriff for not taking a bail bond, good bail be put in and justified in the room of bail before put in who by the practice of the Court were a mere nullity, the Plaintiff cannot recover.

THE Plaintiff having commenced an action against one *John Blower*, by *capias ad respondendum*, returnable in eight days of *Saint Hilary*, *Blower* on the 24th of *January* put in bail, but one of them being clerk to *Blower's* attorney, the Plaintiff treated the bail as a nullity and demanded an assignment of the bail-bond. Finding however that no bail-bond had been taken, and that *Blower* had been suffered to go at large upon the undertaking of his attorney, the Plaintiff on the 5th of *March* brought an action against the present Defendant for an escape; after the commencement of which action, *viz.* on the 30th of *April* one new bail was added in the original action instead of the attorney's clerk, and justified together with the other.

Early in *Easter* Term a rule was obtained by *Best* Serjt. calling on the Plaintiff to shew cause why all proceedings in the action of escape should not be set aside for irregularity.

On shewing cause it was insisted by *Shepherd* Serjt. and admitted by *Best*, that there was no irregularity in the Plaintiff's proceedings; but it was agreed on both sides, that the parties should be bound by the opinion of the Court in this motion, respecting the propriety of the action.

Shepherd contended, that the bail originally put in were as no bail, *Fenton v. Ruggles, ante, vol. 1. p. 356. (a)*; that the action of escape therefore was regularly commenced; and that being once regularly commenced it could not be defeated by bail subsequently put in. He observed, that in the case of *Pariente v. Plumbtree, ante, p. 35.* the bail were put in before the action was actually commenced, and the only question was, Whether the Plaintiff should be at liberty to contend in an action of escape, that bail were not put in at the return of the writ, when they had been allowed according to the practice of the Court?

On the other hand it was urged by *Best*, that the question now to be tried was purely a question of practice depending on the rules established by the Court respecting the allowance of bail, and was therefore improper to be tried in the form of an action. He relied on the case of *Pariente v. Plumbtree*, and *Murray v. Durand, Esp. N. P. Cas. 87.* there cited by Mr. Justice *Heath*, in which latter case the bail were not put in until after the action commenced.

(a) Vid. et. *Wallace v. Arrowsmith, ante, p. 49.*

Lord ELDON Ch. J. said, that the present case certainly went further than *Pariente v. Plumbtree*, but observed that it seemed to have been the opinion of Mr. Justice *Buller* that the Court ought to endeavour to find some means of stopping proceedings of this kind in which questions of practice only were involved.

The Court having taken time to consider of their opinion,

Lord ELDON Ch. J. on this day said; In the case of *Murray v. Durand* the action of escape was brought before any bail had been put in, yet on the rule for the allowance of bail being produced at the trial, Lord *Kenyon* said, "By the rule now produced it appears that the Defendant has satisfied the exigence of the writ; bail above having been put in, and having justified, that is now subsisting bail, and must be taken *nunc pro tunc*." My Brother *Buller* went the same length in *Pariente v. Plumbtree*, and the doctrine in *Fuller v. Prest*, 7 *Term Rep.* 109. seems to admit the principle.

Per Curiam,

Rule absolute.

(In the HOUSE OF LORDS.)

MOOR v. DENN ex dem. MELLOR; in Error.

July 18.

A WRIT of error having been brought to reverse the judgment given in this case by the Court of *Exchequer Chamber*, (*vid. ante*, vol. I. p. 558.) the Plaintiff in error prayed that the judgment of that Court might be reversed, and the former judgment of the Court of *King's Bench* in his favour, (*see* 5 *Term Rep.* 558. and 6 *Term Rep.* 175.) affirmed, for the following among other REASONS:

Because there are no words in the will of *John Carr* which can pass any more than an estate for life to *Sissily Carr*, consequently upon her death the estate of the Defendant in error ceased, and the premises in question descended to the Plaintiff in error as the heir of *John Carr*.

EDWARD LAW.
GEO. WOOD.

The Defendant in error submitted that the opinion and judgment of the Court of *Exchequer Chamber* were right and according to law, and that the same ought to be affirmed, and the original

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A. after giving a life-estate in certain copyholds to *B.* devised as follows; "All the rest of my lands tenements and hereditaments either freehold or copyhold, whatsoever and where-soever; and also all my goods, &c. after payment of my just debts and funeral expenses, I give devise and bequeath the same unto my wife *S. C.* Held that under this devise *S. C.* took only an estate for life.

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judgment of the Court of *King's Bench* reversed for the following among other REASONS:

First, Because by the known and established rules of law in the construction of devises, the intention of the testator, as far as the same can be collected from the whole of his will, is to be carried into effect, although the words used by him in his will would not be sufficient if used in a deed to pass such estate as it appears to have been his intention to devise.

II. Because it was evidently the intention of the testator to give every thing absolutely to his wife which he had a power to dispose of, and which he had not before given to his kinsman *Nicholas Lister*. This intention is manifest from the general words used by him in the residuary clause, which to a person unacquainted with the strict rules of law must have appeared as comprehensive as possible; which do pass the absolute property in the testator's personal estate, and must have been supposed by him to operate in the same manner on the real.

III. Because it appears, that considering the said *Siffily Carr* as the great object of his bounty, and therefore best able to bear the burthen of paying his debts and funeral expences, the testator imposed on her the duty of paying the same, as the condition annexed to the enjoyment of the property devised to her. In consequence of which the said *Siffily Carr* either could not take the estate devised to her without discharging the testator's debts and funeral expences; or by accepting the same estate, became liable to the payment of those debts and funeral expences; a burthen which, if she only took an estate for her life in the premises devised to her, might by possibility have been greater than the benefit to be derived from such devise; whereas the law always presumes that by the devise of property the testator intends a benefit and not an injury to his devisee.

IV. Because the present case is not to be distinguished in principle from the case of *Doe* on the demises of *Palmer* and others against *Richards*, 3 Term Rep. 356. in which it was held that a devisee under a residuary bequest similar in effect to the present took a fee-simple in the lands devised. The words in that will were, "All the rest, residue, and remainder of my messuages, lands, tenements, hereditaments, goods, chattels, and personal estate whatsoever, my legacies and funeral expences being thereout paid, I give, devise, and bequeath unto my sister *Jane Dewdney*; and do hereby constitute and appoint her whole and

sole executrix and residuary legatee of this my will." Every argument of intention drawn from the expressions which are used in that will arises also out of the will in question, and may be applied at least with equal force to the present case. No material distinction can be taken between the form of the charge found in that will, *viz.* "my legacies and funeral expences being thereout paid," and in the present, *viz.* "after payment of my just debts and funeral expences." In both cases according to the strict grammatical construction, the payment of the charge should precede the estate. The word "thereout," which is used in the charge of *Doe v. Palmer*, must be implied in the present case, and then it ought to bear the same construction, or if some such word is not to be implied, the payment of the debts and legacies must be a precedent condition to the devisee's taking any estate, and the argument from it will be still stronger, that she takes a fee, as she might otherwise pay more than she would receive.

V. GIBBS.

Wm. LAMB.

This case was argued at the bar of the House of Lords on the 27th of June by *Law* and *Wood* for the Plaintiffs in error, and by *Gibbs* and *Lamb* for the Defendants in error.

MACDONALD Ch. B. on this day delivered the opinion of the judges, in substance as follows:—In offering to your Lordships the reasons for the opinion which we have formed on this case, I shall avoid a minute examination of the great variety of cases which bear on this subject: contenting myself after what your Lordships have already heard from the bar, with alluding to those from which the principles on this subject are chiefly to be extracted, and with the application of those principles to the present case.

The devise on which the question arises means to give some interest in a real estate to the widow of the testator to the prejudice of the heir at law. What quantity of interest it was his intent to give as disclosed by the words which he has used is the question for your Lordships' determination. One fundamental rule upon the construction of the words of a will is, that those words ought to have an apparent intent, and not be ambiguous or doubtful if the heir is thereby to be disinherited. Another rule is, that the intention of the testator collected from the words

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he has used is to prevail, if it be not in contradiction to some established rule of law. And in order to preserve uniformity and consequently security in administering the law of real property devised by will, it is necessary that the sense which has been put upon particular modes of expression should be adhered to. If a devise of lands be to *A.* without words of limitation, an estate for life only shall pass by that devise, yet from other provisions and expressions an intent may be manifested which will supply the want of such words. The words in the present case are, "First I give and devise unto my kinsman *Nicholas Lister* of *Creswick Greave* in the parish of *Ecclesfield* yeoman all that my customary or copyhold messuage or tenement with the appurtenances situate and being in *Ecclesfield* aforesaid, as the same is now in the tenure or occupation of *Valentine Sykes*; all the rest of my lands tenements and hereditaments either freehold or copyhold whatsoever and wheresoever and also all my goods chattels and personal estate of what nature or kind soever after payment of my just debts and funeral expences I give devise and bequeath the same unto my loving wife *Siffily Carr*, and I do hereby nominate and appoint her sole executrix of this my last will and testament." The question for your Lordships' determination will be, Whether according to the established rules of construing devises of this sort an estate for life passes to the widow of the testator, or an estate in fee? It is clearly settled in a variety of cases, that if one devise his estate to another, *paying his debts*, or *he paying his debts*, or, *paying a sum in gross*, a fee must necessarily pass, because as the devisee is to pay the debts or money in all events, and his interest may cease before he is repaid out of the estate if it be only an estate for life, he may be a loser, which the testator cannot be supposed to have intended. The testator is therefore deemed to have devised an interest which will secure the payment of the debts or sum in gross by the devisee without the hazard of loss on his part. But if the testator direct the debts or sum in gross to be paid out of the profits of the land, then, inasmuch as the land and not the devisee is to bear the burden, no ground is laid for inferring that any greater quantity of interest was intended to be given than is precisely expressed. So if an annual payment by the devisee to another person be directed by the will to continue during the life of such other person, as the devisee may be a loser if he do not survive that person, an intent is from thence col-

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lected that he is to take a fee. The point to be considered then will be, Whether the words used in this will are materially distinguishable from those used in other wills, and which have been held not to denote an intention so expressed by the devisor as to enlarge that which would otherwise be an estate for life only into an estate in fee? This will depend upon the effect of the word "rest," of the word "hereditaments," and of the provision "after payment of my just debts and funeral expences."

In the case of *Canning v. Canning*, *Mosely*, 240. the words used by the devisor were, "all the rest residue and remainder of my messuages lands tenements and hereditaments after my debts legacies and funeral expences are fully satisfied I give in trust for my daughter:" the trustees took but an estate for life. The authority of this case has been said to be questionable by reason of the inaccuracy of many cases in the book in which it is reported. But one of the learned judges has compared the case as reported with the register's book, and it is found to be very correctly reported. It appears that the Court upon long debate declared that the words "rest residue and remainder" being without words of limitation could not operate on the inheritance: this therefore seems a direct authority on this part of the case. In the present case the testator has given an estate to *N. Lister*, which for want of words of limitation amounts only to an estate for life, and when he devises the *rest* of his lands, &c. it would be too strong a construction of that relative word "rest," after what had been determined in the cases referred to, to suppose it to pass all the interest he had in all other lands and the reversionary interest in the lands before devised. The circumstance therefore of this being a residuary devise does not seem sufficient to enlarge that devise beyond the legal import of the words used in the will itself.

Nor do I conceive the word "hereditaments" will have that effect. The settled sense of that word is to denote such things as may be the subject matter of inheritance, but not the inheritance itself, and cannot therefore, by its own intrinsic force enlarge an estate, *prima facie* a life estate into a fee (a). It may have weight under particular circumstances in explaining the other expressions, from whence it may be collected in a manner agreeable to the rules of law that the testator intended a fee. This

(a) In addition to the cases cited in the former argument on this head, see what is said by Lord Kenyon in *Doe d. Small v. Allen*, 8 T. R. 503.

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word occurred in the case of *Canning v. Canning*, but the effect now contended for was not allowed to it, and in the case of *Hopewell v. Lickland*, *Salk.* 239. was there referred to by the Court as having settled that point.

The remaining consideration is, Whether by the words "after payment of my just debts and funeral expences" an intention to pass a fee is so denoted according to the established rules of construction, as to manifest an intention that those debts and expences should be a charge on the devisee or on the lands in her hands. If these words are considered as charging the lands in the hands of the widow, in that case according to the established principles she would take a fee, or she might otherwise be a loser by the devise; if on the rents and profits of the lands her interest would be only for her life (a). In *Dickins v. Marshall*, *Cro. Eliz.* 330. words nearly similar and of the same import were used, viz. "after my debts and legacies paid," but it was held that only a life interest passed. In *Canning v. Canning* the same was adjudged where the words were, "after my just debts funeral expences and legacies are fully satisfied and paid."

I am free to own that I formerly held an opinion that the words of charge in this will were a charge on the lands in the hands of the devisee; and that opinion was founded upon the then latest authority of *Doe d. Palmer v. Richards*, 3 *T. R.* 356. To me that case did then and does still appear to bear a very close resemblance to the present. The words used by the testator in that case are almost exactly similar to the present; excepting that in that case, after the devise of the rest and residue of his lands, tenements, and hereditaments, and all personal estate whatsoever, the testator adds, "my legacies and funeral expences being *thereout* paid;" whereas in the present case the words are, "after payment of my just debts and funeral expences." The word "thereout" is a word of reference: it would be the same thing therefore if the words referred to were themselves repeated, in which case the sentence would run thus: "My legacies and funeral expences being paid out of the rest and residue of my lands tenements and hereditaments and

(a) Upon this subject see *Bro. Abr.* tit. *Weslement*, pl. 18. tit. *Estates*, pl. 78. *Colyer's case*, 6 *Co.* 16. *Welluck v. Hammond*, *Cro. Eliz.* 204. *Walker v. Cellier*, *Cro. Eliz.* 378. *Spicer v. Spicer*, *Cro. Jac.* 527. *Greave v. Dewell*, *Cro. Jac.* 599. *Reed v. Hatton*, 2 *M. d.* 25. *Sir Thomas Muschamp v. Blact*, *Bridgm.* 132. *Redoubt v. Redoubt*, *Hil.* 1713. *Vin. Abr.* tit. *Devise*, 2. a. pl. 18. *Goodright d. Baker v. Stocker*, 5 *T. R.* 13. *Andrew v. Southouse*, 5 *T. R.* 292. *Doe d. Willey v. Holmes*, 8 *T. R.* 1.

all personal estate whatsoever." I am unable to distinguish the difference between devising lands to any one "after paying his legacies," or "his legacies being paid *thereout*." In both cases they are to be paid out of the land which is the subject of the devise. A devise to an individual *after* paying debts seemed to me to mark the same intent of charging the land in the hands of the devisee, as a devise to an individual, the testator's debts being paid *out of* the land devised. Accordingly I find, in the case of *Baddeley v. Leppingwell*, that Mr. Justice *Wilmot*, in giving the judgment of the Court, (Mr. Justice *Yates* being present,) where copyhold tenements had been devised without words of limitation to one sister, she paying thereout an annuity to another sister, says thus: "It is objected that the testator has expressly directed 40*s.* a year to her sister *Elizabeth* to be paid *thereout*; and it is urged that this is equivalent to making it payable out of the rents and profits; and I think it is so (a)." If then that be so, though there be no substantial difference between *Doe d. Palmer v. Richards* and the present case, yet I am of opinion, that notwithstanding that determination the weight of authority obliges me to conclude that *Siffily Carr* took only an estate for life.

After hearing the opinion of the judges, the House on the motion of the Lord Chancellor resolved, that the judgment of the Court of Exchequer Chamber should be reversed, and the judgment of the Court of King's Bench affirmed.

(a) 3 *Burr.* 1541.

M. TATTERSALL, Administratrix of W. TATTERSALL,
v. GROOTE.

July 10.

JUDGMENT for the Defendant having been given in this case, on demurrer to an action brought by the Plaintiff as administratrix, for breach of a covenant entered into with her intestate, but broken since his death (*vide ante*, p. 13.) a rule *nisi* was obtained on a former day* to direct the prothonotary to tax the Defendant his costs, notwithstanding the Plaintiff sued in the character of administratrix.

Shepherd Serjt. shewed cause. In the 23 *H. 8. c. 15.* which gives costs to the Defendant upon a nonsuit or verdict in his favour, and in the 8 & 9 *W. 3. c. 11. s. 2.* which gives him costs upon

Covenant by the Plaintiff as administratrix on a breach subsequent to the death of her intestate, and judgment against her on demurrer: held that she was not liable to costs.

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demurrer, executors are not named; and the same construction has been put by the courts upon both statutes. The Plaintiff, therefore, is not liable to costs upon a demurrer, unless where he would be liable on a nonsuit or verdict against him. The principle on which the courts have proceeded, is, that where a Plaintiff is under the necessity of naming himself executor or administrator, there he shall not pay costs; but if he might have brought the action in his own name, and yet names himself executor or administrator unnecessarily, he shall pay them. *Harris et Ux. v. Hanna*, *Gos. temp. Hardie*. 204. and *Cockerill and Wife v. Kynaston*, 4 *T. R.* 277. In the present case it was impossible for the Plaintiff to have brought this action except in her character of administratrix; for though the breach was subsequent to the death of the intestate, yet the terms of the covenant under which the Plaintiff sues, only enable her to declare as administratrix, being a covenant between the parties for "themselves, their executors, and administrators."

Lens Serjt. in support of the rule. The mere circumstance of the Plaintiff being under the necessity of naming herself administratrix is not sufficient to exempt her from the payment of costs. The cause of action arose within her own time and her own knowledge; and according to *Lee J.* in *Harris v. Hanna*, "the rule is, that where the cause of action arises after the testator's death, the executor is liable for costs, because then he is supposed a sufficient judge of the cause to found an action." So, in *Jenkins and Wife v. Plume*, 1 *Salk.* 207. the court say, "it is only by construction that an executor is out of the 23 *H. 8.* and the reason is, because he is not privy to the original cause of action." The same doctrine is recognised in *Bollard v. Spencer*, 7 *T. R.* 359. where Lord *Kenyon* observes, that "the rule excusing executors from paying costs is founded on this principle, that they are not supposed to be constant of the real situation of the testator's affairs."

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ELDON Ch. J. (who, after stating the case, proceeded thus): The ground on which this motion has been made is, that although the Plaintiff has sued in her character of administratrix, yet that she has sued upon a cause of action which accrued in her own time, namely, the refusal of the Defendant, after the death

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of the intestate, to nominate an arbitrator. After looking into all the cases, we are of opinion, that if the cause of action arose in the time of the administratrix, and if it was not absolutely necessary for her to sue in her character of administratrix, she will be liable to costs. It is impossible to deny, that among the great variety of cases upon this subject, and owing to the inclination of the Court to narrow the indulgence given to executors and administrators in this respect, some cases are to be found in which the simple fact, that the cause of action has arisen subsequent to the death of the testator or intestate, has been held sufficient to subject the executor or administrator to costs. But on a review of all the cases, we think that the sound doctrine to be collected from them is, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to the payment of costs, though the cause of action arose after the death of the testator or intestate. This doctrine seems to be founded on the Act of Parliament of which all the cases are an exposition, namely the 23 H. 8. c. 15. Attending to the language of that Act, perhaps we may be authorized to say, that the sound principle on which the exemption of the executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but that the exemption founds itself on the description of the actions contained in the statute in which costs are to be paid. The words are "Any action, bill, or plaint of debt or covenant upon any especialty made to the Plaintiff or Plaintiffs, or upon any contract *supposed to be made between the Plaintiff or Plaintiffs and any other person or persons.*" The statute of 4 Jac. 1. c. 3. does not carry the matter farther. The exposition of the early cases seems to be, that if the contract be not made with the executor or administrator, but with the testator or intestate whom they represent, then it is not an action "upon a contract supposed to be made with the Plaintiff and any other person or persons," in the language of the Act. Certainly the subsequent cases have gone to the extent of saying, that if the Plaintiff could have declared on the transaction as on a contract made with himself, he shall be liable to costs, though he does unnecessarily describe himself executor or administrator. In a case as early as 21 Jac. 1. *Trebhorn v. Claybrook, Winch.* 70. (a) it is laid down, "that if executors are nonsuit or judgment given against them upon a verdict, they shall not pay costs within the

(a) *Hutt. 63. S. C.*

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23 H. 8. or 4 Jac. for the statute speaks of any contract or speciality made with the Plaintiff, or between the Plaintiff and Defendant, and the executor brings an action upon the contract of another." So in *Anon.* 1 Vent. 92. the distinction taken is, that costs shall not be paid where the action is merely in right of the intestate; but where it is needless for the Plaintiff to name himself executor or administrator, there they shall be paid. In *Bigland v. Robinson*, 3 Salk. 105. it is laid down, that wherever an executor must sue as such, as for instance, where he brings debt on bond due to his testator, he shall not pay costs. And in *Portman v. Cane*, 2 Ld. Raym. 1413. the same doctrine was held, where a breach was assigned in the time of the executor, the Court saying the bond was the cause of action, and the Plaintiff could not sue but as executor. Again, in *Nicholas v. Killigrew*, 1 Ld. Raym. 437. it was agreed, that it is not to any purpose for a Plaintiff to name himself executor where he ought not so to do, but that if he ground his action upon the same contract that was to the testator, he shall not pay costs if he fail in the suit. This distinction saves whole all the cases where an executor could declare upon a conversion in his own time: in such case he stands in the situation of an assignee, and the contract may be considered as made with himself. And it does seem to me, that this distinction is the true principle to be extracted from the three cases in the *Term Reports* of *Cockerill and Wife v. Kynaston*, *Goldthwayte and Wife v. Petrie* (a), and *Bollard and Wife v. Spencer*. Perhaps it may be enough to refer generally to these cases; the substance of which is well collected in *Hullock's Law of Costs* (b), in the new edition of *Bacon's Abridgement*, by Gwillim, and in p. 349. of a new treatise on the *Law of Executors and Administrators*, by a gentleman of *Lincoln's Inn* (c). Without stating it to be possible to reconcile all the cases, it is enough for us to say, that the doctrine last adopted proceeds on the principle which I have now mentioned. The case, therefore, is reduced to this: it being admitted that the cause of action arose in the life of the administratrix, could she declare on this contract as made with herself? We think that she necessarily named herself administratrix, and that she is therefore not liable to the payment of costs.

Per Curiam,

Rule discharged (d).

(a) 5 Term Rep 234.

(b) From p. 173 to 199.

(c) Toller's Law of Executors and Administrators.

(d) Vide etiam *Wilson Executrix v. Hamilton*, ante, vol. 1. p. 445.

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DA COSTA v. CLARKE.

July 1st.

REPLEVIN of a cow. The Defendant pleaded, 1st, the general issue *non cepit*: 2dly, an avowry that as lessee of the *locus in quo* he distrained the cow damage feasant: 3dly, a cognizance as bailiff of one R. L., to whom he had he had underlet the *locus in quo*. After joining issue on *non cepit*, the Plaintiff pleaded in bar to the avowry, "that the said field called *Broad Field*, containing divers, to wit, 100 acres, whereof the said place, in which, &c. was and is parcel as aforesaid from time whereof the memory of man is not to the contrary of right hath been, and ought to have been, and still of right ought to be open and common, in manner following; that is to say, open every third year, that is to say, *on or before* the 15th day of *October*, when the corn was cut and carried off the same for a long time, to wit, for three weeks and upwards;" and that before the said time, when, &c. one I. B. was seised in fee of a messuage and two acres of land, with the appurtenances situate at, &c.; and that he and all those, whose estate he had and hath in the said messuage and land, with the appurtenances for the time being, from time whereof, &c. have used and been accustomed to have, and of right ought to have for themselves and their tenants, occupiers of the said messuage and land, with the appurtenances, common of pasture for all his and their commonable cows, *levant & couchant*, on the said messuage and land, with the appurtenances in the said field called *Broad Field*, of which the said place, in which, &c. is parcel, "every third year when the same was open, and not sown and cultivated in manner aforesaid," as to the said messuage and land, with the appurtenances appertaining; that the said I. B. demised to the plaintiff from year to year; that by virtue of this demise the Plaintiff became possessed of the said messuage and lands, with the appurtenances, and being so possessed before the said time when, &c. put the said cow, being his commonable cow, *levant & couchant*, on his said messuage and land, with the appurtenances, into the said field, to use his common of pasture there, as it was lawful for him to do, "the same time and from thence until and at the taking of the same as aforesaid,

Plaintiff in *replevin* pleaded in bar to, that the *locus in quo*, from time whereof, &c. ought to be open and common "on or before the 15th of *October*, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards;" that the Plaintiff, the time when, &c. put in his cattle, "the same time being when the said field was and ought to be open and common as aforesaid." Held that the plea was bad for uncertainty even after verdict, the right of common being too generally described both in its commencement and conclusion.

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being when the said field was and ought to be open and common as aforesaid;" that the cow was in the said place in which, &c. parcel, &c. until Defendant of her own wrong, &c. And this, &c. wherefore, &c. To the cognizance a similar plea in bar was pleaded. The Defendant replied, that *Broad Field* ought to be open every third year, only whilst every part thereof has been unsown with corn or grain, and not at any time after or whilst the same or any part thereof hath been sown with corn or grain. This the Plaintiff traversed in his rejoinder, and upon that point issue was joined.

This cause was tried at the *Westminster* sittings after *Hilary* term, before Lord *Eldon*, Ch. J. when a verdict was found for the Plaintiff.

In *Easter* term *Marshall* Serjt. moved for a rule, calling on the Plaintiff to shew cause why judgment should not be entered for the Defendant, *non obstante veredicto*: 1st, because the prescription as laid was uncertain, since it was not shewn how long before the 15th of *October* the right of common was to commence, or how long after the three weeks it was to continue. On this point he cited *Greene v. Berry*, 2 *Roll. Abr.* 264, 5. *Vin. Abr.* tit. *Prescription*, D. where a prescription for copyholders to pay two years rent, or less, upon renewal, was held void for uncertainty; and *Allen's* case, *ibid.*, where the same was held of a prescription to pay one penny, or thereabouts, for tithes; also *Selby v. Robinson*, 2 *T. R.* 758. where the custom alleged was for poor necessitous and indigent householders to carry away rotten boughs in a chafe; and *Broadbent v. Wilkes, Willes*, 360. (a) where the custom was for the owners of certain pits to lay the coals and rubbish near to such pits: 2dly, because the prescription for common was not conformable to the custom alleged at *Broad Field*, and that the exercise was not conformable to the prescription; for the custom laid was that *Broad Field* is open every third year when the corn is cut and carried off, the common prescribed for was, when *Broad Field* is open and not sown and cultivated; and the exercise was stated to have been not during the three weeks when the corn was cut and carried off, nor when the field was not sown or cultivated, but when *Broad Field* was open and common as aforesaid.

A rule nisi was granted; which, having been enlarged to this term, *Bayley* Serjt. now shewed cause. The customs alleged in

(a) See also the cases there collected by the learned Editor.

the cases cited were positively uncertain. Uncertainty being made part of the custom, certainty was necessarily excluded. But in this case, the words "three weeks and upwards" are equivalent to "three weeks at least." How much longer may depend upon many circumstances; which circumstances the Plaintiff is not bound to state, since it is unnecessary for a Plaintiff to state more of a prescription than will justify himself. The question then will be, Whether, as the Plaintiff has stated that the field ought to be "open and common for three weeks and upwards," and that when the Plaintiff's cattle were put it was "open and common as aforesaid," the Court will not intend, after verdict and issue taken upon a collateral point, that the cattle were put in during the three weeks. Though these pleas might have been subject demurrer, yet the matter of a plea must be taken most favourably for the party pleading after issue joined on a collateral point; and if it be doubtful in what manner words are to be understood, they shall be so taken as to support the verdict. *Stennet v. Hogg*, 1 Saund. 227. *Bedam v. Clerkson*, 1 Ld. Raym. 123. *Growther v. Oldfield*, 2 Ld. Raym. 1225. *Avery v. Hook*, Cowp. 825.

Lord ELDON, Ch. J. (stopping *Marshal* on the other side). We are of opinion, that the prescription stated is too uncertain, both with respect to its commencement and duration, to support the verdict. The reasoning in support of the plea in bar would have been very strong, if the Plaintiff had averred that the cattle were put in within the three weeks. But the words are, "when the field was and ought to be open and common as aforesaid." And we think that these words must refer to the three weeks *and upwards*, and that they do not ascertain whether the cattle were put in during the three weeks, or during that time which is included under the words "and upwards." And though the words for "three weeks and upwards" are under a *videlicet*, yet if we could suppose them to be struck out, the averment would then be, that the field ought to be open on or before the 15th of *October*, when the corn is cut and carried off the same *for a long time*, which without a qualification of the length of time, would be too uncertain to be supported. It also appears to us, that it is not sufficiently pointed out, when the common is to commence, since it may happen that the corn may not be cut and carried before the 15th of *October*, or even before the end of three weeks after that day. The Court will infer almost anything after verdict; but we think

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think in this case there can be no inference to uphold the allegations of the special plea.

Per Curiam,

Rule absolute.

July 1st.

HANDCOCK v. BAKER and three Others.

A private person may justify breaking and entering the Plaintiff's house, and imprisoning his person, to prevent him from committing murder on his wife.

TRESPASS for breaking the Plaintiff's dwelling-house, and assaulting him therein, and dragging him out of bed, and forcing him without cloaths out of his house along the public street, and beating and imprisoning him without cause.

Two of the Defendants suffered judgment by default, and the other two pleaded, 1st, not guilty: 2dly, that the Plaintiff in the said dwelling-house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing; and that her life being in great danger she cried murder and called for assistance; whereupon the Defendants, for the preservation of the peace, and to prevent the Plaintiff from so killing and slaying his wife, and committing the said felony, endeavoured to enter by the door, and knocked thereat; and because the same was fastened, and there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house, and somewhat break, &c. doing as little damage as possible, and gently laid hands on the Plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and for the same purpose and also for that of taking and delivering the Plaintiff to a constable, to be by him taken before a justice, and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable cloaths on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such cloaths, which he might have done; and because he did not nor would so do, but wholly refused and went into bed there, and remained there at the end of such reasonable time, and would not quit the same, although thereto requested, the Defendants for the

same purposes as they so kept and detained the Plaintiff as above-mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order for those purposes to take him therefrom, whereupon the Plaintiff assaulted and would have beat the said Defendants if they had not defended themselves, which they did, and if any damage happened to the Plaintiff it was occasioned by his own assault, and the Defendants for the purposes in that behalf aforesaid, gently laid hands upon the Plaintiff and took him from the bed and out of the dwelling-house along the public streets for a reasonable time, and kept and detained him for a short and reasonable time for those purposes, till they could find a constable, and as soon as they could find a constable delivered him to the constable for the purpose in that behalf aforesaid.

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The Plaintiff replied *de injuriâ suâ propriâ*, and by way of new assignment pleaded, that he sued out his writ and declared as well for the trespasses justified, as also for that the Defendants at the times when, &c. beat and ill-treated the Plaintiff with much greater violence and imprisoned him for a longer time than was necessary and proper for any of the purposes in the plea mentioned.

Issue having been joined on the replication and new assignment, the cause was tried before *Grose J.* at the last Spring assizes for *Norfolk*, when the jury found for the Plaintiff on the general issue, and for the defendants on the special justification.

In *Easter* term last a rule *Nisi* was obtained calling on the Defendants to shew cause why the judgment for the Defendants on the special justification should not be arrested, and a verdict entered for the Plaintiff on the general issue, with 1*s.* damages. The case having stood over till this term.

Shepherd and *Williams* Serjts. now shewed cause, and contended that if the Defendants were justified in entering the Plaintiff's house and preventing him from killing his wife in the first instance, they were also justified in taking the proper means to prevent him from accomplishing that purpose at any time while the same intent continued; that after verdict, the allegation that "there was no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife" must be taken to have been proved; they cited 9 *Ed. 4.* 26. *b.* *Bro. Ab.* tit. *Trespass*, pl. 184. where to trespass for assault and imprisonment the

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Defendant pleaded, that the Plaintiff was lying in wait in the highway to rob the King's subjects, that one *Alice* was riding on the same highway, against whom the Plaintiff drew his sword and commanded her to deliver her purse, whereupon she levied hue and cry, that the Defendant was riding there and heard the cry, and returned and took the Plaintiff, and because there were no stocks in the vill he carried him to S. and there delivered him to the constable; and the plea was held good by the whole Court, and *Moile* said, if one say to me, "See this man, I will certainly kill him," in this case I may hold him so that he do not kill the man, and this holding is no imprisonment (*a*); they also referred to 22 Ed. 4. 45. b. 2 Rol. Ab. tit. *Trespass*, E. 4. where it is said by *Fairfax*, "If you see two men fighting so that one may perhaps kill the other, it is legal for you to part them and to put one in your house till his passion be passed."

Sellon and *Bayley* Serjts. in support of the rule observed, that the cases were distinguishable from the case in question, inasmuch as this was a case of interference between husband and wife, the former of whom has to a certain extent the power of correcting the latter; that although the Defendants, if they had seen the wife in actual danger, might perhaps have been justified; yet without any warrant or constable they could not interfere by way of prevention, merely because the intention continued; that the law has provided a remedy for the wife in case the husband threaten to beat or to kill her; she may either have a writ of *supplicavit* out of *Chancery*, F. N. B. 80. or exhibit articles of the peace in the *King's Bench*; that in this case it did not appear even that the wife was present at the time when the Plaintiff was taken out of bed; whereas it was necessary for the Defendants to allege, not only that the Plaintiff had the intent but the power to kill his wife; and that in order to justify the imprisonment, they should also have averred that the intention continued during the whole time in which the Plaintiff was detained by the Defendants.

Lord ELDON Ch. J. If the reasoning be good that a wife ought to apply for assistance to those courts where the law has provided assistance for her, it will equally apply to the first entry of the house by the Defendants, as to the subsequent assault and imprisonment which is stated to have taken place in the bed-room. I think,

(a) In that case it is also said by *Needham*, | mit to gaol if he intends to do a felonious
"In these cases, he may arrest and com- act."

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however, that a wife is only bound to apply to those remedies, where it is probable that the injury to be apprehended will be prevented by such application. In this case the Plaintiff being about to commit a felony by killing and slaying his wife, the Defendants interfered by breaking and entering the house in order to prevent the execution of that intent: and "for the same purposes," that is, with a view to prevent the Plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bed-room, into which they had permitted him to enter in order to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the Plaintiff had changed his purpose; and it is argued that it ought to have been averred that his purpose actually continued: but if the preceding allegation be true, that the Defendants entered the bed-room for the same purposes for which they had previously entered the house, the latter allegation was unnecessary; since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the Defendants entered the bed-chamber and detained the Plaintiff for the purpose of preventing him from killing and slaying his wife? It is not difficult to conceive that under some circumstances it might be more especially the Defendants' duty to interfere in that manner. Suppose *A.* endeavour to lay hold of *B.* who is in pursuit of *C.* with an intent to kill him, and *B.* thereupon ceases to pursue with the view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect; in which case the detention of *B.* would be justified. In this case the jury were competent to consider whether under all the circumstances of the case, including the presence or absence of the wife, the Plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact the jury have found that the Defendants kept and detained the Plaintiff after he had gone into the bed-room for the same purposes for which they kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer, that after verdict it must be presumed that every thing is proved which is necessary to support the verdict; and the jury have found that it was necessary for the preservation of the woman's life that the Defendants should do what they did.

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HEATH J. I am of the same opinion. It is a matter of the last consequence that it should be known upon what occasions bystanders may interfere to prevent felony (*a*). In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented. In this case the Defendants broke and entered the Plaintiff's house in order to prevent the commission of murder, and that seems to have been admitted to be a good justification. The only dispute therefore turns on the propriety of their conduct towards the Plaintiff after they had suffered him to go into the bed-room. Now I think that enough is stated in the justification to support the verdict, since the jury have thought that the conduct of the Defendants was right. After verdict we may suppose any thing. We may suppose that the Plaintiff's passion continued, and that he again declared that he would kill his wife.

(*a*) Indeed there seems to be very high authority for the interference of private individuals in cases of riot, though no felony be committed. The question underwent a very solemn discussion in 1597 (39 *Eliz.* at which time the country was in a very unquiet state,) before all the judges in a case which is called "Case of armes." *Poph.* 121., and is as follows: "Upon an assembly of all the justices and barons at *Serjeants Inn* this term, on *Monday* the 15th day of *April*, upon this question moved by *Anderfon* Ch. J. of the Common Bench; Whether men may arm themselves to suppress riots, rebellions, or to resist enemies and to endeavour themselves to suppress or resist such disturbers of the peace or quiet of the realm? And upon good deliberation it was resolved by them all, that every justice of peace, sheriff and other minister or other subjects of the king where such accident happen may do it; and to fortify this their resolution, they perused the statute of 2 *Ed.* 3. which enacts, that none be so hardy as to come with force or bring force to any place in affray of the peace, nor to go or ride armed night nor day, unless he be a servant to the king in his presence, and the ministers of the king in the execution of his precepts, or of their office and those who are in their company assisting them, or upon cry made for weapons to keep the peace, and this in such places where accidents happen, upon the penalty in the same statute contained; whereby it appeareth that upon cry made for weapons to keep the peace, every man where such accidents happen for breaking the peace, may by the law arm himself against such evil-doers to keep the peace. But they take it to be the more discreet way for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the king in the doing of it." This case is spoken of with approbation by the judges in the great case of *Messenger* and others, *Kel.* 76. and its principle is adopted by *Hawkins* in his pleas of the crown, *lib.* 1. c. 65. f. 11. where he says, "It hath been holden that private persons may arm themselves in order to suppress a riot, from whence it seems clearly to follow that they may also make use of arms in the suppressing of it if there be a necessity for so doing." he adds indeed, that it seems hazardous for private persons to go so far in common cases, and that such violent methods seem only proper against such riots as favour of rebellion.

ROOKE J. I am of the same opinion. It is highly important that by-standers should know when they are authorised to interfere. In this case the life of the wife was in danger from the act of the husband. The Defendants therefore were justified in breaking open the house, and doing what was necessary for the preservation of her life. The jury find that they have done this.

CHAMBRE J. There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do any thing to prevent the perpetration of a felony. In this case it is stated that the Plaintiff purposed feloniously to kill and slay his wife, to prevent which the Defendants interfered in the manner stated in the plea. The justification has been found by the verdict; and the Defendants therefore are entitled to the judgment of the Court.

Rule discharged.

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WARD v. HARRIS.

July 18.

ASSUMPSIT. The first count of the declaration stated, that whereas on, &c. at, &c. in consideration that the Plaintiff, at the special instance and request of the Defendant then and there sold to the Defendant a *certain horse* of the said Plaintiff, at and for a *certain quantity of certain oil*, to be therefore delivered by the said Defendant to the said Plaintiff *within a certain time*, which elapsed before the commencement of this suit, and then and there delivered the said horse to the said Defendant, he the said Defendant undertook and then and there faithfully promised the said Plaintiff to deliver the said oil to the said Plaintiff accordingly; yet, the Defendant although often requested, hath not delivered the said oil or any part thereof to the said Plaintiff, but hath hitherto wholly neglected, &c.

The declaration stated that in consideration that the Plaintiff had sold to the Defendant a *certain horse* of the Plaintiff, at and for a *certain quantity of certain oil*, to be delivered within a *certain time*, which had elapsed before the commencement of the suit, the Defendant promised to deliver the said oil accordingly. Held well enough after verdict.

The other counts were general, and *non assumpsit* was pleaded.

The cause was tried before Lord Eldon Ch. J. at the sittings after last *Hilary* term, and a verdict was found for the Plaintiff.

In *Easter* term last, Cockell Serjt. having obtained a rule calling upon the Plaintiff to shew cause why judgment should not be arrested for the uncertainty of the declaration,

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Shepherd and *Bayley* Serjts. shewed cause. Whatever might have been the fate of this declaration on special demurrer, still it is well enough after verdict. Indeed if the objection of uncertainty prevail in this instance, it must prevail in almost every action of *assumpsit*. It is true, that in trespass more certainty is requisite as to the thing demanded. But both Lord *Mansfield* and *Yates* J. in *Bertie v. Pickering et Ux.* 4 Burr. 2455. observed that the reason of the distinction is, that the Defendant in trespass may be able to justify the taking. General words are sufficient where the certainty lies within the Defendant's notice, *Com. Dig. tit. Pleader, C. 26*. Indeed in this case, if the words of the declaration had been "a certain quantity, to wit, so many gallons, of certain oil, to wit, of such a sort," the declaration would clearly have been good. And although the omitting to specify the quantity and species under a to wit, might have been cause of special demurrer, yet after verdict, it must be presumed that the jury have ascertained those circumstances. Besides, the count is not particularly uncertain. For if the agreement had been that the Plaintiff should sell his horse to the Defendant to be paid for in money without mentioning any price, the law would have implied, that the Defendant should pay as much money as the horse was worth. So here the agreement being that the Plaintiff should sell his horse to be paid for in oil, the law will imply that the Defendant ought to deliver such a quantity of oil as would amount to the value of the horse, though he be at liberty to make up the amount in any species of oil which he may think proper.

Cockell Serjt. *contra* observed, that the Plaintiff professed to declare on a special contract, and yet had not specified what the terms of that contract were; that admitting this general mode of declaring to be good in the case of a sale for money, yet that this was not a sale but an exchange; the commutation of goods for money being a sale, but the commutation of goods for goods being an exchange. 2 Bl. Com. 446.

Lord ELDON Ch. J. At the trial it appeared to me that it would be very difficult to support this count. It is true that it makes a difference whether the objection be taken before or after verdict; but on the best consideration which I have been able to give the case, it strikes me that the count cannot be supported even after verdict. The passage cited from *Blackstone's Commentaries* amounts to no more than this, that exchange is not a sale, and

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and sale is not exchange. If the consideration of a contract be goods, though in one sense of the word this contract may be called an exchange, yet in another sense it may be called a sale, for it is not necessary to a sale that money should pass. The declaration in this case states, that the Plaintiff at the special instance and request of the Defendant, sold to the Defendant a certain horse of the Plaintiff, but it does not state what the value of the horse was, and I do not know that it is a term of such a contract arising by necessary legal implication, that the horse was to be sold for its value. The declaration proceeds, "at and for a certain quantity of certain oil to be therefore delivered by the said Defendant to the said Plaintiff within a certain time, which elapsed before the commencement of the suit." In the case of a sale for money, as the law implies that so much money shall be paid as the article is worth, no dispute can arise concerning the quality of what is to be received, the quality of money being always the same. I incline therefore to think it necessary to express value in some manner in such a contract as this, where something other than money, is to be given for a commodity. Here the value of the horse is not stated; the value of the oil is not stated, nor is any thing stated with respect to the quantity or quality of the oil. It appears to me, that the terms of the declaration leave it so wholly uncertain what the special contract was, that we cannot tell what we shall intend it to have been. Enough does not appear upon the declaration to enable us to say what the contract meant to be alleged must be, as it would have appeared on the record if some other averments had been put on that record, or as it must have been proved before a jury. This may have been a special contract that any quantity of any oil of the value of the horse should be given for the horse; it may have been a special contract, that a certain specific quantity of certain specified oil, not so great or greater in value than the horse should be given for the horse: the real terms of the contract may be different from either of these, and the proper damages may vary infinitely. I doubt whether this, after verdict, can be considered as a contract defectively stated. When it is to be collected from the record what special contract was meant to be stated, the defect of the statement on the record, may be supplied by intending proof before a jury; but here the record does not state any special contract, so that I can be certain what I can intend as having been proved

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before the jury. Upon the whole, it does not appear to me that the declaration states enough of any contract.

Accordingly *The Court* made the rule absolute for arresting the judgment. But on the following day intimated that they wished to consider further of their opinion.

Lord ELDON Ch. J. on this day said—My brothers *Heath*, *Rooke*, and *Chambre* are all of opinion, that the objections which have been taken to this declaration cannot prevail after verdict. I yield to their authority.

Rule discharged.

July 1st.

COWELL, Administrator of COWELL, v. EDWARDS.

It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond, regard being had to the number of sureties; though the insolvency of the principal and of the other sureties be not proved.

INDEBITATUS assumpsit for money paid.

John Cowell the Plaintiff's intestate having entered into a joint and several bond with seven other persons, two of whom were principals and the five others as well as himself sureties, was together with his co-sureties called upon by the obligees to pay the sum engaged for; the Defendant and two of the other sureties paid each a part of that sum, but the present Plaintiff's intestate paid the residue. Upon this the Plaintiff considering the Defendant and one of the two sureties who had already contributed as the only solvent sureties, called upon them to pay their proportion and now brought this action to recover from the Defendant such a sum of money, as when added to what had been already paid by him would make up one-third of the whole sum paid to the obligees, deducting only what had been contributed by the fourth surety not called upon at this time.

The cause was tried before Lord *Eldon* Ch. J. at the sittings after last *Easter* term, when the Plaintiff obtained a verdict for a sixth of the whole sum paid, not allowing for the sum paid by the fourth surety, with liberty to move the Court to enter a verdict for the whole demand.

Lens Serjt. however on the part of the Defendant obtained a rule calling upon the Plaintiff to shew cause why this verdict should not be set aside altogether and a new trial be had. He took these objections; that this action could not be maintained at law by one co-surety against another; that if the action could be maintained for one-sixth of the whole sum engaged for, and which,

which, under the circumstances of the present case, he insisted was all that could be recovered from the Defendant; yet, that the insolvency of the two principals and of the three other co-sureties should have been proved in order to entitle the Plaintiff to the present verdict.

Shepherd and *Vaughan* Serjts. were proceeding on this day to shew cause, and cited *Deering v. Lord Winchelsea* (a), when they were stopped by .

The Court, who observed that it might now perhaps be found too late to hold that this action could not be maintained at law, though neither the insolvency of the principals or of any of the co-sureties were proved; but that at all events the Plaintiff could not be entitled to recover at law more than one-sixth of the whole sum paid. •

And Lord *Eldon* Ch. J. said, that he had conversed with Lord *Kenyon* upon the subject, who was also of opinion that no more than an aliquot part of the whole, regard being had to the number of co-sureties, could be recovered at law by the Defendant; though if the insolvency of all the other parties were made out, a larger proportion might be recovered in a court of Equity.

In consequence of these intimations from the Court, and of an opinion thrown out by them that the matter must ultimately be carried into a court of Equity; an offer was made by the Defendant and acceded to by the other side, to enter a nonsuit without costs.

Nota; Lord *Eldon* also added a doubt of his own, Whether a distinction might not be made between holding that an action at law is maintainable in the simple case where there are but two sureties, or where the insolvency of all the sureties but two is admitted, and the insolvency of the principal is admitted, and holding it to be maintainable in a complicated case like the present, such insolvency being neither admitted nor proved, and where the Defendant after a verdict against him at law may still remain liable to various suits in Equity with each of his other co-sureties, and where the event of the action cannot deliver him from being liable to a multiplicity of other suits founded upon his character as a co-surety.

(a) See the next case.

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(*The Reporters have been favoured with a Manuscript Note of the Case of Deering v. Lord Winchelsea referred to in the preceding argument.*)

(IN THE EXCHEQUER.)

Feb. 8th,
1785

Sir EDWARD DEERING v. The Earl of WINCHELSEA,
Sir JOHN ROUS, and the Attorney-General.

If A., B. and C. become bound as sureties for D. in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds.

LORD Chief Baron EYRE (present *Hotbam* and *Perryn* Barons) delivered the opinion of the Court.

Thomas Deering, younger brother of the Plaintiff, was appointed in 1778 receiver of fines and forfeitures of the customs of the outports, and entered into three bonds, each in the penalty of 4000*l.* with condition for duly accounting; in one of which the Plaintiff joined as surety, in another Lord *Winchelsea*, and Sir *John Rous* in the third. *Thomas Deering* became insolvent and left the country; the balance due to the crown was 6602*l.* 10*s.* 8*d.* part of which was levied on his effects, and when the bill was filed there was due 3883*l.* 14*s.* 8½*d.* which was rather less than the penalty of each of the bonds. The bond in which the Plaintiff had joined was put in suit against him, and judgment obtained. He filed his bill demanding contribution against Lord *Winchelsea* and Sir *John Rous*, and praying an account of what was due to the crown and money levied on the Plaintiff (supposing execution to follow the judgment), and that Lord *Winchelsea* and Sir *John Rous* might contribute to discharge the debt of *Thomas Deering* as two of the sureties for that debt. The appointment, the three bonds, and the judgment against the Plaintiff, were in proof, and the balances were admitted by all parties.

The Lord Chief Baron after stating the case observed, that contribution was resisted on two grounds; first, that there was no foundation for the demand in the nature of the contract between the parties, the counsel for the Defendants considering the title to contribution as arising from contract expressed or implied; secondly, that the conduct of Sir *Edward Deering* had deprived him of the benefit of any equity which he might have otherwise had against the Defendants.

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The Lord Chief Baron considered the second objection first. The misconduct imputed to Sir *E. Deering* was, that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be such that he could not support himself in his extravagances and faithfully account to the crown; that Sir *E. Deering* was privy to his brother's breaking through the orders given him to deposit the money he received in a chest under the key of the comptroller. His Lordship observed that this might be true, and certainly put Sir *E. Deering* in a point of view which made his demand indecorous; but it had not been made out to the satisfaction of the Court that this constituted a defence. Mr. *Madocks* had stated that the author of the loss should not have contribution; but stated neither reason nor authority to support the principle he urged. If these were circumstances which could work a disability in the Plaintiff to support his demand, it must be on the maxim, "that a man must come into a court of Equity with clean hands;" but general depravity is not sufficient. It must be pointed to the act upon which the loss arises, and must be in a *legal* sense the cause of the loss. In a *moral* sense Sir *E. Deering* might be the author of the loss; but in a *legal* sense *Thomas Deering* was the author; and if the evil example of Sir *E. Deering* led him to it, yet this was not what a court of Justice could take cognizance of. There might indeed be a case in which a person might be in a *legal* sense the author of the loss, and therefore not entitled to contribution; as if a person on board a ship was to bore a hole in the ship, and in consequence of the distress occasioned by this act it became necessary to throw overboard his goods to save the ship. This head of defence therefore fails. The real point is, Whether there shall be contribution by sureties in distinct obligations?

It is admitted, that if they had all joined in one bond, for 12,000*l.* there must have been contribution (a). But this is said to be on the foundation of contract implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated that no man could be called upon to contribute who is not a surety on the face of the

(a) See *Lyster v. Nelson*, 1 *Fern.* 456. where it was held, that where one obligor that is surety is sued alone, by custom of London he shall make his co-sureties contribute. So where surety pays a debt and has no counterbond, by custom of London he shall maintain action against the principal.

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bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract (a). Contract indeed may qualify it as in *Swain v. Wall*, 1 Ch. Rep. 149. where three were bound for H. in an obligation, and agreed if H. failed to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only (b).

There are in the *Register*, fo. 176. b. two writs of contribution, one, "*De contributione faciendâ inter coheredes*," the other, "*De feoffamento*;" these are founded on the statute of *Marlebridge*, 52 H. 3. c. 9. which enacts, "that if any inheritance whereof but one suit is due descends unto many heirs as unto parceners, whofo hath the eldest part of the inheritance, shall do that one suit for himself and fellows, and the other co-heirs shall be contributaries according to their portion for doing such suit. And if many feoffees be seized of an inheritance whereof but one suit is due, the Lord of the fee shall have but that one suit and shall not exact of the said inheritance but that one suit as hath been used to be done before. And if these feoffees have no warrant or means which ought to acquit them then all the feoffees according to their portion shall be contributaries for doing the suit for them." The object of the statute was to protect the inheritance from more than one suit. The provision for contribution was an application of a principle of justice. In *Fitzb. N. B.* 162. B. there is a writ of contribution where there are tenants in common of a mill and one of them will not repair the mill, the other shall have the writ to compel him to contribute to the repair. In the same page *Fitzherbert* takes notice of

(a) On inquest of office *sci. fa.* issued to M. and E. his wife ter-tenants, who alleged that the father of E. was seized of the lands and other lands which descended to E. and A. now wife of B., between whom purparty was made and the land in question allotted to the purparty of E., and so she held the land in purparty for other lands allotted for the purparty of A. and prayed aid of A. which was granted, and A. came not, but M. and E. came; and on the matter judgment for the king and execution awarded, and that M. and E. should have over *pro rata*, and as to the issues M. and

E. his wife prayed, that as her parcener had taken the profits of other lands, she should be charged with issues *pro rata*, and accordingly judgment that M. and E. should recover *pro rata*, 40 Aff. 24. See also *Dame Gresham's case*, Moor, 429. Cro. Eliz. 506. S. C. where by way of plea in abatement to a recognizance in chancery against ter-tenants, it was pleaded that the cognizor was seized of other lands *tempore recognitionis factæ*.

(b) But see *Peter v. Rich*, 1 Ch. Rep. 35. where two out of three sureties were compelled to pay in moieties, the third being insolvent.

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the writs of contribution between co-heirs and co-tenants; and supposes that between tenants the writ cannot be had without the agreement of all (a), and the writ in the register (b) countenances the idea; yet this seems contrary to the express provision in the statute. In Sir *Wm. Harbet's* case, 3 Co. 11. b. many cases are put of contribution at common law. The reason is, they are all in *quali jure*, and as the law requires equality they shall equally bear the burthen. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of Equity than at law. At law the party is driven to an *audita querela* or *scire facias* to defeat the execution and compel execution to be taken against all. There are more cases of contribution in equity than at law. In *Equity Cases Abridged* there is a string under the title "Contribution and Average." Another case at law occurred in looking into *Hargrave's Treatise* in a treatise ascribed to Lord *Hale* on the prisage of wines. The King's title is to one ton before the mast and one ton behind the mast. If there are different owners they may be compelled in the *Exchequer Chamber* to contribute (c). Contribution was considered as following the *accident* on a general principle of equity in the Court in which we are now sitting.

In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of these cases sureties have a common interest and a common burthen. They are bound as effectually *quoad* contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement they must all contribute equally.

(a) *Fitzherbert* seems only to say that if one of the tenants does the suit voluntarily, he shall not have contribution; and the statute seems not to have been construed as having given the writ, but a remedy to prevent one being detained for the whole. See 3 Co. 14. b. as to lands extended.

(b) Fo. 177. *et prædictus A. sectam illam pro se et prædictis, B., C., D., et E. ex eorum assensu facit, &c.*

(c) There being a charge on a manor for

the repairs of bridges, and the whole levied on the lord, the Court of *Exchequer* on *English* bill for contribution, held that all those who held any part of the demesnes by purchase from the crown were liable to contribute. *Ribb v. Barker*, *Hard.* 131. See also *Case of Loddon Bridge*, Sir *W. Jones*, 273. and the cases collected from *Vin. Abr.* tit. *Contribution and Average*.

(d) *Hargrave's Law Treatise*, p. 120.

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In this case Sir *E. Deering*, Lord *Winchelsea*, and Sir *J. Rous* were all bound that *Thomas Deering* should account (a). At law all the bonds are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown; but as between themselves they are *in æquali jure*, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent the third is obliged to contribute a full moiety. This circumstance and the possibility of being made liable to the whole has probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person.

There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel, *Show. Parl. Cas.* 19. *Moor*, 297. The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shews that contribution is founded on equality and established by the law of all nations.

There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions.

The decree pronounced was, that it being admitted by the Attorney General and all parties that the balance due was 388*l.* 14*s.* 8½*d.* the Plaintiff Sir *E. Deering* and the Defendants the Earl of *Winchelsea* and Sir *J. Rous* ought to contribute in equal shares to the payment thereof, and that they do accordingly pay each 129*l.* 11*s.* 6½*d.* and on payment the Attorney General to acknowledge satisfaction on the record of the judgment against the Plaintiff and the two bonds entered into by the Earl of *Winchelsea* and Sir *J. Rous* to be delivered up.

This being a case which the Court considered as not favourable to Sir *E. Deering* and a case of difficulty, they did not think fit to give him costs.

(a) See the clause in 33 H. 8. c. 39. f. 80 as to equal charging of lands liable to the king's debts. Sir *Thomas Cecil's* case, 7 Co. 20. b. *Primrose v. Bromley*, 1 Atk. 39 and Sir *Dennis O'Carrel's* case, *Ambler*. 61.

(b) In the case of *Alan de Chartelet*, *Trin.*!

12 Ed. 2. Rot. 112. the barons of the *Exchequer* were commanded by writ to apportion among parceners a certain debt due from their ancestor to the king. *Madox Hist. Exchequer*, 667.

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PERKINS Administrator v. PETIT.

July 2d.

A RULE *Nisi* was obtained on a former day for leave to amend a *scire facias* against bail in error by the record of the recognizance; the amendment proposed was the insertion of the costs of the verdict.

A *scire facias* against bail in error may be amended by the record of the recognizance.

Shepherd Serjt. shewed cause and insisted that the Court would not allow this amendment (a), the effect of which might be to falsify the plea of *nul tiel record* though true when pleaded. *Buckson v. Hyskins*, *Salk.* 52. 2 *Lord Raym.* 1060. *S. C.* *Vavafor v. Baile*, *Salk.* 52. *Hillier v. Frost*, 1 *Str.* 401.; he admitted that two cases are referred to in 2 *Lord Raym.* 1060. where it was allowed, but observed that there it was before plea pleaded.

Cockell Serjt. in support of the rule relied on *Sweetland v. Beesley, Barnes*, 4. where the Court permitted a *scire facias* against bail to be amended after issue joined on *nul tiel record*. He observed, that though it had not been very usual to allow such an amendment as against bail to the original action, yet the reason on which it had been refused probably was that they might not thereby be prevented from surrendering the principal, whereas bail in error cannot surrender the principal, but must pay the debt.

The Court took till this day to consider of the case, when Lord *Eldon* Ch. J. said,—We have no doubt of the power of the Court to amend a *scire facias* against bail, but as it does not appear to have been the modern practice to permit amendments in cases of this kind, we think the bail in this case ought not to be taken by surprise. At the same time we desire that our refusal to amend may not be drawn into precedent, since after this notice we shall not think ourselves bound to abstain from exercising the power of granting these amendments in future.

Per Curiam,

Rule discharged.

(a) Vid. *Tidd's Pr. K. B.* 831. ed. 1. 1063. ed. 2. and 2 *Sellen's Pr. C. B.* 64. ed. 1798.

On the first day of this term Mr. Baron *Chambre*, who had during the vacation been appointed to succeed Mr. Justice *Buller* in this Court, took his seat and the oaths.

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Robert Graham of the *Inner Temple* Esq. Attorney General to his Royal Highness the Prince of *Wales*, succeeded him in the Court of *Exchequer* and was knighted.

Arthur Onslow of the *Middle Temple* Esq. was called to the honourable degree of Serjeant at law in the course of this term. The motto on his rings and on those of Mr. Baron *Graham* who was called to this degree at the same time, was, "*Et placitum læti componite fœdus.*"

THE END OF TRINITY TERM.

C A S E S .

ARGUED AND DETERMINED

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IN THE

Court of COMMON PLEAS

IN

Michaelmas Term,

In the Forty-first Year of the Reign of GEORGE III.

WHITFIELD v. SAVAGE.

Nov. 7th:

THIS was an action for money had and received, which came on to be tried before Lord Eldon Ch. J. at the Guildhall sittings after last Trinity term.

The circumstances of the case were as follow: a person of the name of *Dibdin* being in want of 50 *l.* applied to the Plaintiff for the loan of that sum, who gave him a bill for 55 *l.* 6 *s.* drawn by himself upon one *Thornton*, and accepted by the latter. *Thornton* had effects of the Plaintiff in his hands to the amount of the bill. *Dibdin* indorsed the bill to the Defendant from whom he received the full amount, and the Defendant indorsed it over, to another person. The day before the bill became due *Dibdin* took 50 *l.* in part payment of his debt to the Plaintiff, but soon after he had paid it into his hands, the Plaintiff in the presence of *Dibdin* being informed that *Thornton* the acceptor was become insolvent,

A. with a view to accommodate *B.* lent him a bill drawn by himself upon and accepted by *C.* who had effects of his in his hands; *B.* indorsed it to *D.* who indorsed it over; the day before the bill became due *B.* paid the amount to *A.*, who on hearing that *C.* had failed gave *B.* a check for the

amount of the bill and sent him with it to *D.* to enable him to pay the bill when due; four days after that time *A.* learning that payment had not been demanded, desired *D.* not to pay the bill, as no notice of non-payment had been given by the holder and offered to indemnify him; notwithstanding this *D.* afterwards paid the bill; held, 1st, that *D.* paid the bill in his own wrong; 2dly, that *A.* was entitled to recover back the money paid into the hands of *D.* by *B.* in an action for money had and received.

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said, "that it would be of no use for him to keep *Libdin's* money as he should not like the bill to be returned upon him;" he therefore gave to *Dibdin* a check on his banker for 50*l.* (being the sum which he had just before received of him) desiring him to take it to the Defendant: *Dibdin* accordingly gave the check to the Defendant together with 5*l.* 6*s.* of his own, to enable him to provide for the bill, telling him that *Thornton* had become insolvent, and was gone off. Four days after the bill had become due, the Plaintiff having learnt from the Defendant that payment of the bill had not been demanded, desired him not to pay it as no notice had been given by the holder of its non-payment, and at the same time promised to indemnify the Defendant against the consequences of a refusal. Soon after this the bill was brought to the Defendant who paid it notwithstanding the caution he had received from the Plaintiff; whereupon the latter brought this action to recover the 50*l.* paid to the Defendant to enable him to provide for the bill. The jury found a verdict for the whole amount.

Shepherd Serjt. now moved for a rule to shew cause why this verdict should not be set aside and a nonsuit be entered; contending, 1st, that in this case the Plaintiff had waved his right to notice from the holder of non-payment by the acceptor; inasmuch as he had deposited the amount of the bill in the hands of the indorser for the purpose of enabling him to discharge it, in contemplation of the inability of the acceptor so to do; that it was clear that the drawer might wave his right to notice, by promising the holder to pay the bill subsequent to the time of its becoming due; and for the same reason he might wave it by an antecedent promise, for that if the drawer do any thing from which the holder may infer that he does not mean to require notice, the notice is dispensed with; that it is not necessary that the *holder* should give notice of non-payment by the acceptor, for the acceptor himself may do it; that a notice before the bill becomes due, that it will not be paid when due, is tantamount to a notice after the bill has become due, that it was not paid when due; and that the Plaintiff in this case before the bill became due was so fully satisfied that it would not be paid when due, that he deposited the amount with the indorser and thereby evinced that he did not require notice; that the indorser thereby became a trustee for the holder, and would not therefore have been justified in returning the money, for that when goods or money are deposited by *A.* with *B.* for the benefit of *C.*

upon a precedent consideration, the deposit is not revocable, though in cases where the deposit is made without a precedent consideration it is; *Clark's case*, 2 *Leon*, 30, 31. *Dyer*, 49. and *Alderson v. Temple*, 4 *Bur.* 2239. *Per Lord Mansfield*; 2dly. That this action could not be maintained by the present Plaintiff who had advanced nothing, the money paid into the hands of the Defendant being in fact the money of *Dibdin*; for the check for 50*l.* was nothing more than a return of the money previously paid by *Dibdin* to the Plaintiff, and was paid to the Defendant by *Dibdin's* hand.

Lord ELDON Ch. J. In this case the acceptor having had effects of the drawer in his hands, it must be taken as clear that notice of non-payment was *primæ facie* necessary. *Thornton* the acceptor was first liable, and in case of the Defendant being called upon as indorser he had a right to call upon *Dibdin* the prior indorser and upon the Plaintiff as drawer. Had *Dibdin* been really an indorser only he would have had the same right to call upon the Plaintiff, but as the bill was given to him merely for his accommodation he had no such claim. Notwithstanding the insolvency of the acceptor, the law required that if the bill were not paid when due, notice of non-payment should be given. On the day before the bill became due the Plaintiff told *Dibdin* that from the nature of the acceptor's circumstances there was reason to apprehend the bill might be returned upon him, and in order to prevent that from taking place desired him to carry the check for 50*l.* to the Defendant. On that transaction, without more, it appeared to me impossible for the Defendant to contend that because the Plaintiff put money into his hands *a priori* to pay the bill in case a due demand thereof should be made; that he was therefore authorized to pay it whether a due demand should be made or not: admitting however that the act of the Plaintiff in sending the money before the bill became due amounted to an authority to pay whenever a demand should be made, provided nothing intervened, yet as the Plaintiff before any demand had been made, and after the holder had been guilty of laches, expressly cautioned the Defendant not to apply the money in payment of the bill, it seems to me that the Defendant paid it in his own wrong. The object of the Plaintiff in putting the money into the Defendant's hands was to protect him in case the latter duly paid the bill, and he did this under an impression that

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both the Defendant and himself were liable; but circumstances having decided that neither were liable, he had a right to say that the money should not be applied in payment of the bill and that it remained in the Defendant's hands for his own use. It has been argued from the case in *Burrow*, that if money be paid into the hands of *A.* for the use of *B.* on a precedent consideration, that payment cannot be countermanded; and I agree to the truth of this proposition, provided such payment constitute *A.* a holder for the use of *B.* at all events. But in a case like this, where money is paid by the drawer into the hands of an indorser, for the indemnity both of the indorsee and drawer, the question is, Whether it be not paid for the use of the holder so long as he shall have a right to demand it, and when he has no longer any right to demand it, that is, when the holder has been guilty of laches, then for the use of the drawer? In the present instance, the Plaintiff not only cautioned the Defendant against paying the bill because it was overdue without notice, but offered to indemnify the Defendant against the consequence of contesting the question with the holder. Could then the holder have recovered either against the Plaintiff or Defendant? The acceptor having had effects of the drawer in his hands, and the insolvency of the former not being sufficient to dispense with the necessity of notice, it is clear that he could not. With respect to the second objection, that this action for money had and received ought to have been brought by *Dibdin* instead of the present Plaintiff, it appears to me that the action is well brought, for these reasons. The night before the bill became due the Plaintiff sent the money in dispute to the Defendant; it was the Plaintiff therefore that advanced it. It is true indeed, that *Dibdin* being the person liable in conscience before either the Plaintiff or Defendant, had previously put 50*l.* into the Plaintiff's hands; but as the money in dispute was actually sent by the Plaintiff to the Defendant, the former had a right to call upon the latter to restore it to him. As between the Plaintiff and Defendant the money may be considered as advanced by the Plaintiff: and in what manner the Plaintiff and *Dibdin* might settle between themselves does not concern this Defendant. I should think, as having actually advanced it, he had a right to recover it, even if after the recovery he held it as a trustee for *Dibdin*. In contemplation of law the Plaintiff has lost the value of his effects in the hands of the acceptor; and it is

on that principle that notice of non-payment is required. In contemplation of law he must ultimately have been the loser by the failure of the acceptor. He therefore deposited the money with the Defendant to answer the bill if duly demanded. But when the holder was no longer entitled to enforce payment of the bill, the money so deposited must be considered as remaining in the Defendant's hands for the use of the Plaintiff, and the Defendant having taken upon himself to dispose of that money in payment of the bill, after notice to abstain from so doing, and after an offer of indemnity, is in law liable to answer to the Plaintiff for the amount.

Heath and Rooke Js. (absente *Chambre J.*) concurring;

Shepherd took nothing by his motion.

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WILSON *qui tam* v. GILBERT, Clerk.

Nov. 10th.

THIS was an action for non-residence. In the Declaration the parish was described as *Saint Ethelburg*. At the trial evidence was given on the part of the Defendant to shew that the real name was *Saint Ethelburga*. Upon this *Chambre J.* before whom the cause was tried at the *Guildhall* sittings after last *Trinity* term, nonsuited the Plaintiff.

In an action for non-residence the parish was styled in the declaration *Saint Ethelburg*; evidence that the real name was *Saint Ethelburga*; held a fatal variance.

Cockell Serjt. now moved to set that nonsuit aside and have a new trial, contending that the names of *Saint Ethelburg* and *Saint Ethelburga* were the same; and that indeed the name in the declaration was sufficiently well stated, inasmuch as in *Maitland's Hist. of London* (a) the parish was styled *Saint Ethelburg*, and in *Eton's The-saurus*, p. 333. *Saint Ethelburge*, which is *idem sonans* with *Ethelburg*.

The Court observed, that *Saint Ethelburg*, and *Saint Ethelburga* might be distinct *Saints*, the one male and the other female; but that at any rate, the nonsuit, being right according to the evidence given at the trial, ought not now to be disturbed; particularly in this kind of action.

Cockell took nothing by his motion.

(a) *Maitland* says that it was so called from being dedicated to *Ethelburga*, vol. 2. p. 1098. In *Stow's Survey of London*, by *Strype*, vol. 1. book 2. c. 6. p. 99. the church is called the parish church of *Saint Ethelburge*, virgin: but a table of benefactors to the church and poor of the parish of *Saint Ethelburga*, is there inserted. In *Stow's Survey*, by *Seymour*, vol. 1. p. 361. book 2. c. 5. the parish is called *Saint Ethelburga*, and the church the parish church of *Saint*

Ethelburga. But *Seymour* says that *Stow* himself calls the church the church of *Saint Ethelburgh*, virgin; which says *Seymour*, seems to be a mistake, she being a widow; but he does not notice the variance in the name. *Noorthunk*, in his *Hist. of London*, p. 557. styles the church the church of *Saint Ethelburg*, so called from its dedication to *Ethelburga*. In *Baron's Liber Regis*, p. 567. the name is *Saint Ethelburga*.

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Nov. 11th. DAVIES and Others, Assignees of SHIVERS a Bankrupt,
v. CHIPPENDALE.

If a Defendant be holden to bail under a judge's order, a material fact being concealed from the judge, which would probably have induced him to refuse the order, the Court will on application discharge the Defendant, even though there was a sufficient affidavit of debt, independent of the order. But they will not discharge him from a detainer lodged against him by a third person while in custody under the judge's order.

THE Defendant in this case having been holden to bail under a judge's order for 5000*l.* and upwards, at the suit of *Shivers* the Bankrupt on the 26th of *September* last, a detainer was lodged against him on the 8th of *November* following for 1300*l.* at the suit of the Assignees.

On a former day in this term a rule *nisi* was obtained for discharging the Defendant from the original arrest upon an affidavit, stating that a settlement of accounts had taken place between the Bankrupt and the Defendant, and that the former had given to the latter a receipt in full of all demands; and because this circumstance was not disclosed to the learned Judge at the time when the order was applied for, the Court made the rule absolute for discharging the Defendant, though it was contended by *Bayley* Serjt. that the original affidavit of debt was sufficient, independent of the order, and that no affidavit to contradict it could be admitted, for which the case of *Smith v. Frazer*, 1 *Bl.* 192. was cited.

After this *Best* Serjt. obtained another rule *nisi* for discharging the Defendant from the detainer at the suit of the Assignees; and on this day contended, that as the order upon which the original arrest was made had been discharged by the court, the Defendant never was legally in custody under that arrest, and that consequently the detainer which was lodged against the Defendant while in such illegal custody could not be supported. He cited a case in 1 *Sellon's Pract.* p. 586. in the Appendix; ed. 1792, where a Defendant having been arrested upon process which had expired and detained by a continuance of the same process, was discharged by the Court because the original arrest was illegal.

The Court were of opinion that the authority cited was not applicable to the case of a Plaintiff lodging a detainer against a Defendant in custody at the suit of a stranger; that whatever might be the case with respect to the Plaintiff who made the original arrest, it would occasion extreme inconvenience if a third person were to be put under the necessity of examining into the validity of the custody of the Defendant before he lodged his detainer; that the assignees of a bankrupt were to this purpose to be considered as strangers to the original arrest; and that independent of these considerations the original arrest was not void since it was

made under the order of a judge, which order was good at the time of the arrest, though the Court for particular reasons had since thought proper to discharge it.

Rule discharged.

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SINGLETON and Others, Assignees of HOWELL, .v.
BUTLER.

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THIS was an action for money had and received.

At the trial before Lord ELDON Ch. J. at the *Guildhall* sittings after last *Trinity* term the following case was proved: The Defendant having drawn a bill of exchange on *Howell* the bankrupt, dated the 1st of *March* 1796, payable to his own order three months after date, it was accepted by *Howell*, and indorsed by the Defendant to his bankers. On the 2d of *June*, which was two days before the bill would become due as it was originally drawn, *Howell* came to the Defendant and told him that in consequence of several houses having failed he had lost large sums of money, and his bills had been returned upon him; and he informed the Defendant as his friend (but informed no other person thereof) that his affairs were bad, and would not pay above 10s. in the pound. Upon this the Defendant said that *Howell* must pay his bill, and that if he would, he the Defendant would be security to *Howell's* creditors for so much as the estate should produce if they agreed to a composition. *Howell* accordingly paid the bill, and on the 5th of *June* became bankrupt. It also appeared that the date of the bill had been altered from the 1st to the 21st of *March*, and that the time of payment had been altered from three months after date to two months after date. There was no evidence however to shew by whom this alteration was made, or that the Defendant had any knowledge of it, but the circumstances of the case rather afforded a presumption that he did not. His Lordship observed to the jury that this was a bargain for a fraudulent preference, the consideration of which was of no value; that the circumstance of the bankrupt having called upon the Defendant two days before the bill became due, and after disclosing his situation having acceded to the Defendant's offer, afforded strong ground for them to infer fraud, and that the inference of fraud as far as related to the bankrupt was rather strengthened by the alteration which had taken place in the date and

The acceptor of a bill of exchange two days before the expiration of the time for which the bill was originally drawn, called upon the indorser and informed him privately that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time to become security to the creditors for so much as the estate should produce, whereupon the acceptor paid it, and four days after became bankrupt; it also appeared that the bill had been altered so as to make it fall due before this transaction, but without the Defendant's knowledge. Held that this was sufficient proof of fraudulent preference to defeat the payment of the bill.

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and time of payment of the bill. The jury found a verdict for the Plaintiffs for the amount of the money received by the Defendant on the bill.

Shepherd Serjt. now moved for a rule calling on the Plaintiffs to shew cause why there should not be a new trial, contending that the preference given to the Defendant was not voluntary, inasmuch as the Defendant had insisted on having the bill paid, and that it was not necessary there should be any threats of legal process to rebut the presumption of fraudulent preference. He cited *Smith v. Payne*, 6 T. R. 152. where a security given to a creditor by a debtor at the mere instance of the former, but without any threats of an arrest, was held valid, though the debtor himself informed the creditor of the bad situation of his affairs.

Lord ELDON Ch. J. having stated the case to the Court with his directions thereupon, declared himself of the same opinion which he gave at the trial, and distinguished this from the case of *Smith v. Payne*, because there the creditor came to the debtor, and the security was taken for a debt actually due.

Heath, Rooke, and Chambre, Js. concurring with his Lordship. *Shepherd* took nothing by his motion.

Nov. 11th.

MORRIS v. LANGDALE.

In a Declaration for slander the Plaintiff stated that he was a jobber or dealer in the funds, and as such had been accustomed lawfully to contract; that the Defendant said of him, as such jobber or dealer, "He is a lame duck;" meaning that he had not fulfilled his contracts in respect of the said stocks or funds; in consequence of which divers persons refused to fulfil their contracts with him, (specifying the contracts,) and he was prevented from fulfilling his contracts with other persons. Held, that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the Plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. *Qu.* Whether it can be stated as special damage that divers persons refused to fulfil their contracts with the Plaintiff, since he might recover a compensation by action, if the contracts were lawful.

ACTION on the case for defamation. The declaration stated, "that whereas at the time of speaking and publishing the several false, scandalous, and malicious words hereinafter mentioned, the Plaintiff was and for a long time to wit &c. before then had been a jobber or dealer in the public funds or securities of this kingdom, commonly called the stocks, to a great amount or value; and the Plaintiff had been for all that time as such jobber or dealer in the said funds or stocks as aforesaid accustomed lawfully to contract, and had from time to time lawfully contracted with divers persons for the purchase and sale of divers shares and interests in the said stocks or funds, to be delivered and transferred as well immediately as at future days from the times of making such contracts, by means of which said trafficking and exchanging of his property in

the said funds or stocks and other the ways and means aforesaid he the said Plaintiff had acquired and was daily from time to time acquiring great profits and emoluments to the comfortable support of himself and his family, and to the great increase of his riches at &c.

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And whereas the said Plaintiff had at all times conducted himself with great punctuality and fidelity in fulfilling his contracts relating to the said public funds or stocks, and until the speaking and publishing of the said false scandalous and malicious words hereinafter mentioned, never had been insolvent or was suspected of insolvency, or of not fulfilling or of not being able to fulfill his contracts and engagements as such jobber or dealer in the said stocks or funds or otherwise, to wit at &c. Nevertheless the said Defendant well knowing the premises but falsely and maliciously devising, contriving, and intending to injure the said Plaintiff in his good name, credit, and reputation, and also as such jobber or dealer in the said stocks or funds as aforesaid, and to bring him the said Plaintiff into great scandal, disrepute, and mistrust amongst all his neighbours and other the subjects of our said Sovereign Lord the King, to whom he was known on &c. at &c. in a certain discourse which the said Plaintiff then there had at a certain place there called the *Stock Exchange*, the same being a place where brokers and jobbers in the said stocks or funds usually meet and transact their business, with one *Benjamin Mason* of and concerning the said *John*, as such jobber or dealer in the said stocks or funds as aforesaid, falsely and maliciously said, spoke, and published to the said *Benjamin Mason* in his presence, and hearing of and concerning the said Plaintiff as such jobber or dealer in the said stocks or funds as aforesaid, these false, scandalous, and malicious words following (that is to say) "He (meaning the said Plaintiff) is a lame duck (meaning that the said Plaintiff had not fulfilled his contracts in respect of the said stocks or funds)."

There was another count which only varied from the above, by stating that the words were spoken in a conversation with divers other subjects of this realm; and that the words were "*Morris* is a lame duck (a)."

The declaration by way of special damage then averred that certain persons (naming them) had refused to fulfil their contracts with the Plaintiff (specifying the contracts) in consequence of the words spoken. "By reason whereof the Plaintiff had not

(a) The third and sixth counts only are here stated, as none of the others came in question upon this demurrer.

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only lost great gains which he would otherwise have acquired by the fulfilment of the said contracts, but had also been greatly hindered from fulfilling his contracts made with divers other persons in respect of the said stocks or funds, and had been greatly embarrassed in his said employment, and had been for a long time to wit &c. prevented from following the same, by being in consequence of the said words publicly reported, announced, posted, and considered at the said *Stock Exchange* and elsewhere as a person unable to perform his contracts in regard to the said stocks or funds, so that very many persons to wit, (naming them) and others not only refused to fulfill their contracts in regard to the said stocks or funds before then made with the Plaintiff, but also to have any farther dealings in the said stocks or funds with him. By reason whereof the Plaintiff had lost great sums of money, &c. and had been put to great expence, &c. and was much injured in his credit and employment," &c.

To these counts the Defendant pleaded *actionem non* "because the said Plaintiff at the said several times of speaking and publishing the said several supposed words in these counts mentioned had not fulfilled his contracts in respect of the said stocks or funds. And this, &c. Wherefore," &c.

The Plaintiff demurred specially to the above plea, "for that the said Defendant hath not shewn or disclosed any particular contract or contracts of the said Plaintiff in respect of the said stocks or funds which the said Plaintiff had not fulfilled as aforesaid, nor hath the said Defendant shewn or disclosed what such contracts or contract were or was or with whom made or in what manner the same were or was broken by the said Plaintiff, and also for that the said Defendant hath not in or by his said plea set forth any day time and place when or where the said several facts alleged by him in that plea against the said Plaintiff or any of them happened, and also for that the said Defendant hath set forth the charges and allegations in that plea contained in so general and uncertain a manner that the said Plaintiff cannot know what particular facts the said Defendant will attempt to establish by evidence on the trial of this cause, in support of the matters alleged in the same plea; and therefore the said Plaintiff cannot be prepared to disprove or answer the same or safely take issue thereon, and for that the said plea is in various other respects uncertain defective insufficient and informal."

Shepherd Serjt. in support of the demurrer, relied on *J Anson v. Stuart*, 1 *Term Rep.* 748. and *Newman v. Bayley* cited therein and

also in *1 William's Saunders*; 241. *in notis*, and observed that the rule laid down in *Underwood v. Parks*, 2 *Str.* 1200. that the truth of the words must be pleaded was expressly said to be founded in this principle, that "the Plaintiff might come prepared to defend himself;" which principle would be utterly defeated if the truth of the words were allowed to be given in evidence under a plea so general as the present.

Clayton Serjt. contra, observed, that if the Court should determine that it was necessary for the Defendant to allege all the circumstances of time and place, and the particular persons with whom the contracts broken by the Plaintiff were made, it would introduce extreme prolixity on the pleadings; but he insisted that at all events the declaration was bad, for that the trade concerning which the Plaintiff complained that the words were spoken, had been declared illegal by the 7 *Geo. 2. c. 8.*; the title of which act is, "An act to prevent the infamous practice of stock-jobbing," and the preamble of which speaks of the same trade as "the wicked pernicious and destructive practice of stock-jobbing"; that although it might be true that a person as a jobber in stocks might make certain contracts which were not illegal, yet as the act had treated stock-jobbing *eo nomine* as illegal, the plaintiff was bound to shew that the words in question were spoken of such contracts as were legal and might have been enforced; he also contended that the *innuendo* in the declaration which stated the words to mean "that the Plaintiff had not fulfilled *his contracts* in respect of the said stocks or funds," was much too vague and general, and not warranted by the preceding *colloquium*, it being the province of an *innuendo* to explain only and not to enlarge. *Rex v. Greep*, 2 *Salk.* 513.

Shepherd in reply argued, that it was clear from the very act of parliament which had been cited, that all jobbing in the funds was not illegal, since certain sorts of stock-jobbing were recognized by the act itself, and that it could not therefore be necessary for the plaintiff to aver that the trade which he carried on was legal, for that the Court would not presume that it was otherwise; that if it were necessary to make such averment in the present case the Plaintiff had done it by stating that he as such jobber had been accustomed lawfully to contract; that the *innuendo* which explained the words must also necessarily relate to lawful contracts, since the very word "contract" imports legality; that the words were alleged to be spoken of the Plaintiff as *such jobber or dealer*, and it

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had before been averred, that as such jobber or dealer he was accustomed to make lawful contracts; and that with respect to the generality of the words "*his contracts*" as the object of an *innuendo* is only to explain the meaning of ambiguous words, and not to introduce any specific allegation, if the meaning of the words to be explained be general, the *innuendo* must be general also.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ELDON, Ch. J., who after stating the pleadings proceeded as follows—In support of the demurrer to the plea it has been very strongly argued, that in consequence of its generality the Plaintiff must proceed to trial at the hazard of being able to produce evidence applicable to every contract which he ever made. The objection was then taken, that the Plaintiff had not stated a sufficient cause of action. We are all of opinion, that the *innuendo* "meaning that the said Plaintiff was incapable of fulfilling his contracts in respect of the said stocks or funds" does not necessarily import that he was incapable of fulfilling his legal contracts, notwithstanding the argument that the word "contract" *ex vi termini* imports legality. The declaration states, that the plaintiff as a jobber or dealer in the public funds or stocks, had been accustomed lawfully to contract, but it is not averred what kind of jobber or dealer he was. We do not consider a jobber or dealer in the funds as a known trader and having a character as such. My Brother *Heath* has indeed removed from my mind the impression which it had at first received, *viz.* that a jobber or dealer in the funds was always to be considered as a culpable person, by shewing the necessity of such persons for the accommodation of the market; yet that circumstance will not obviate the objection that all the acts of parliament consider stock-jobbers as of two species, *viz.* that which is called the infamous practice of stock-jobbing and that which is honest. The infamous practice is that in which a man enters into those engagements respecting the public funds which are prohibited by the act of parliament. The honest practice is that in which a man engages for the purchase or sale of stock whereof the vendor is possessed at the time. In this case no averment has been introduced distinguishing of which species the Plaintiff was. It is true that he has averred that as such jobber or dealer he was accustomed lawfully to contract, but this amounts to no more than saying, that he had entered into some lawful contracts, and *non constat* that

that he may not as such jobber or dealer have entered into some which were unlawful. It was contended, that engagements contrary to law are not contracts. I answer, that in the language of the act of parliament they are treated as contracts: and the act points out the distinction between contracts which are lawful and contracts which are unlawful. The *innuendo* therefore which explains the words "lame duck" to mean that the Plaintiff has not fulfilled his contracts, may apply equally to lawful or unlawful contracts; and consequently no special damage can be said to have arisen from words which may import an accusation that the Plaintiff has not done that which the law prohibits. Another doubt has arisen in the mind of the Court, whether the special damage has been so laid as to support the action, even supposing a jobber or dealer in the funds to be a known trader. A great part of the special damage consists in an allegation that other persons did not perform their lawful contracts with him. Now if the Plaintiff has sustained any damage in consequence of the refusal of any persons to perform their lawful contracts with him, it is damage which may be compensated in actions brought by the Plaintiff against those persons: and the law supposes that in such actions the Plaintiff would receive a full indemnity. Perhaps indeed that part of the declaration in which the Plaintiff complains, that he had been prevented from performing his contracts with other persons, might be sufficient to support the action. Independent however of this latter consideration respecting the defect in stating the special damage, we are of opinion that the third and sixth counts of the declaration are bad.

The Court however gave leave to amend.

DOE on the Demise of JOHN PLANNER and CATHERINE *Nov. 18th.*
his Wife *v.* SCUDAMORE.

THIS was an ejectment to recover the possession of a messuage and lands described in the declaration, which came on to be tried at the last assizes for *Bedfordshire*, when a verdict was found for the Plaintiffs subject to the opinion of the Court on a case in substance as follows.

Thomas Lane on the 9th of *March* 1792, by his will duly executed, devised as follows: "I give and devise my messuage or

outlive the said *G. L.* but not otherwise, and in case she shall die in the lifetime of the said *G. L.* then to *G. L.* his heirs and assigns for ever.—Held that the devise to *C. B.* was a contingent remainder; and barred by a recovery suffered by *G. L.*

Devise to *G. L.* the testator's heir at law for life, and from and after his death to *C. B.* her heirs and assigns in case she shall survive and

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tenement and farm called *Buckingham-hall* with the lands and appurtenances thereunto belonging and all other my real estate whatsoever situate lying and being in the parishes of *Higham Gobiais Pulloxhill* and *Barton* or elsewhere in the county of *Bedford* unto and to the use of my brother *George Lane* of the city of *Canterbury* and his assigns for and during the term of his natural life without impeachment of waste, and from and immediately after his death then I give and devise the same unto and to the use of my amiable friend *Catherine Benger* (niece to Mrs. *Mary Shindier* of *Burgate-Street Canterbury* and who at this time lives with me and superintends the management of my family) her heirs and assigns for ever in case she the said *Catherine Benger* shall survive and outlive my said brother but not otherwise; and in case the said *Catherine Benger* shall die in the lifetime of my said brother then and in such case I give and devise my said messuage farm lands and real estate in the said county of *Bedford* unto and to the use of my brother *George Lane* his heirs and assigns for ever." In *March* 1793 the said *Thomas Lane* died without having altered or revoked his said will, leaving the said *George Lane*, his brother, and heir at law, him surviving, who thereupon entered on the estate so devised, being the premises in question. In *Trinity* term 1793 the said *George Lane* levied a fine *sur conuzance de droit come ceo, &c.* with proclamations of the premises in question, and declared the use of the said fine to himself in fee. On the 15th *December* 1796 the said *George Lane*, by his will duly executed, devised the said premises to *Edward Scudamore* the Defendant in fee; and in *November* 1799 the said *George Lane* died in possession of the premises, without having altered or revoked his said will. On the 28th *May* 1798 the said *Catherine Benger* made an actual entry upon the premises in question, being within five years after the levying the said fine, and for the purpose of avoiding the same. *Catherine Benger* afterwards married *John Planner*, and on the 17th of *January* 1800, before the bringing of this ejectment, the said *John* and *Catherine Planner*, the lessors of the Plaintiff, made an actual entry on the said premises.

The question for the opinion of the Court was, Whether the lessors of the Plaintiff were intitled to recover? If they were, the verdict was to stand, but if not, a verdict to be entered for the Defendant.

Williams Serjt. for the lessor of the Plaintiff. I contend that the fine levied by *George Lane*, the tenant for life, did not bar the estate

estate devised to *Catherine Benger*. It may clearly be collected from the will, that it was the intention of the testator to give his estate to *C. Benger* in case she survived his brother; for it is not to be supposed that in limiting an estate for life to his brother, he could have intended to give him the power of defeating the immediate devise over to *C. Benger*: If therefore this intention be clear the Court will give it effect, provided that can be done without militating against any known rule of law. Now this intent may be effectuated either by considering the devise to *C. Benger* as a vested remainder subject to be divested upon a condition subsequent; or by considering it as an executory devise. 1st, The words, "In case she the said *C. Benger* shall survive and out-live my said brother but not otherwise," may be considered as a condition subsequent. In *Sir John Robinson v. Comyns, Cas. temp. Talb.* 164. *R. Sheffield* devised his lands to the use of Defendant and his heirs in trust for payment of his debts, and afterwards in trust for his grand-daughter *Mary* (the Plaintiff's late wife) and the heirs of her body, remainder to the Defendant and his right heirs, upon condition that he should marry the testator's grand-daughter. The grand-daughter refused to marry the Defendant, and having married the Plaintiff joined with her husband in suffering a recovery of the premises. Lord Chancellor *Talbot* observed, that one question was, Whether the condition annexed to the Defendant's remainder was a condition precedent or subsequent? and as to that he was inclined to think it a condition subsequent; saying, "There are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either, according to the intent of the person who creates it." The reasoning of Lord *Talbot* applies strongly to this case; and he collected the intent of the testator from the whole will. Here the intent of the testator to make the condition a condition subsequent very plainly appears. The limitation to *C. Benger* is immediate; and then follow the words by which the condition is created. Lord Ch. J. *Willes* in *Acherley v. Vernon, Willes* 156. observes, "I know of no words that either in a will or deed necessarily make a condition precedent: but the same words will either make a condition precedent or subsequent according to the nature of the thing and the intent of the parties." Provided the intent be clear the case of *Edwards v. Hammond, 3 Lev.* 132. may be cited to shew that a devise like the present may be construed to be a vested remainder, subject

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subject to be divested by a condition subsequent. In that case a copyholder surrendered to the use of himself for life, and afterwards to the use of his eldest son and his heirs, if he should live to the age of twenty-one years, provided and on condition that if he should die before twenty-one, that then it should remain to the surrenderor and his heirs; and the Court held that it was an immediate surrender to the eldest son, subject to be defeated by condition subsequent, if he did not attain twenty-one; and compared the case to *Springe v. Cæsar*, Sir W. Jones, 389. 1 Rol. Ab. 415. pl. 12. where a fine was levied to the use of A. and his heirs, if B. did not pay him 10 s. on the 10th of September, and if B. did pay it, to the use of A. for life, remainder to B. and his heirs, and it was held that an estate in fee vested immediately in A. subject to be divested by the payment afterwards. The words "and not otherwise" added at the end of the devise to C. Benger can scarcely be supposed to alter the nature of the condition, since they import nothing more than what might have been implied without them. It may be said that if this doctrine be well founded it would have equally applied to the case of *Plunket v. Holmes*, 1 Lev. 11. Sir T. Ray. 28. S. C. (a) where the devise was to Thomas the eldest son for life, and if he died without issue living at the time of his death, to Leonard another son and his heirs, but if Thomas had issue living at his death that then the fee should remain to the right heirs of Thomas for ever. But it may be observed that the condition upon which the estate to Leonard depended preceded the limitation of that estate, which estate could not be intended to vest until the death of Thomas without issue, whereas in the present case an immediate estate is limited in terms to C. Benger, which estate is made by subsequent words to depend on a contingency that might well happen after the vesting of the estate. 2dly, Supposing that this devise is not to be considered as a vested remainder with a condition subsequent, I contend that it may be construed to be an executory devise. G. Lane the tenant for life, with the ultimate reversion in fee, was the heir at law of the devisor. The devise therefore is to be considered in the same light as if the devisor had said, "If G. Lane my heir at law shall die in the life of C. Benger, then I give an estate to C. Benger in fee"; which would unquestionably have created an executory devise in fee to C. Benger. It was a rule of law long before the case of *Plunket v. Holmes*, that a devise to the heir at law is void. *Counden v. Clerke*, Hob. 30. indeed it was so held at common law:

(a) 1 Sid. 47. S. C. 1 Keb. 29. 115. S. C.

for Lord Bacon says, "*Cláusula vel dispositio inutilis* are said when the act or the words do work or express no more than the law by intendment would have supplied; and therefore the doubling or iterating of that and no more which the conceit of the law doth in a sort prevent and pre-occupate is reputed nugation." Bacon's *Maxim's of the Law*, Reg. 21. And the rule has been held equally to apply to a devise of a reversion as of an estate in possession. Thus where a man devised land to his wife for life remainder to J. S. his next heir in fee, it was held that the heir should be in of the reversion by descent, and not of the remainder by devise. *Preston v. Holmes*, 1 Rol. Abr. 626. (1) pl. 2. Suppose in this case that C. Bengier had died in the lifetime of G. Lane, and the latter had been sued on the bond of his ancestor, is it possible to contend that he could have pleaded *riens per descent*? It is true that in this case there is a devise to G. Lane for life: but since the estate so devised is nothing more than G. Lane would have taken had no devise to him been made, the devise to him must be considered in law as void altogether; and the devise to C. Bengier must be considered as if the preceding limitation to G. Lane were struck out of the will. In this view of the case the devise to C. Bengier would stand as a devise to her in fee in case she survived the testator's heir at law, which would be a clear executory devise. Where A. devised to his eldest son in fee, upon condition that if he paid not 20*l.* to the second son and daughter, the land should be to the second son and daughter and their heirs, it was resolved that "the first devise to the eldest son and his heirs, being no more than the law gives, is void; and it is but a future devise to the second son and daughter upon the eldest son's default of payment: and the case is no other but as if one had devised that if his eldest son did not pay all legacies that his lands should be to the legatees." *Haynsworth v. Pretty*, Cro. Eliz. 833. 919. It is further established by the cases of *Kent v. Harpoole*, 1 Vent. 306. *Pollexfen*, 92. S. C. Sir T. Jones, 76. S. C. (a) and *Hooker v. Hooker*, Cas. temp. Hardwicke, 13. that if the ultimate reversion in fee comes upon the tenant for life, the life estate is merged, and an estate in fee is immediately executed in him; the consequence of which is that all contingent remainders depending on the estate for life are barred. Now as the reversion in fee was devised to G. Lane as well as an estate for life, an estate in fee was executed in him immediately on the death of the devisor; and it is clear that if G. Lane took a fee immediately on the death of the devisor, the devise to C. Bengier must have

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(a) 3 Keb. 500. 731. S. C.

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been an executory devise. In both the last-mentioned cases *Lewis Bowles'* case, 11 Co. 79. was cited to shew that the life-estate and the reversion in fee though united to certain purposes, might open upon the happening of the contingency, so as to let in the remainder; but the Court was of a contrary opinion: and indeed the doctrine in *Lewis Bowles'* case is not very intelligible. In the case of *Plunket v. Holmes* before referred to it is true the devise to *Leonard* was construed to be a contingent remainder: as to which it must be observed, that this case stands alone opposed to all the above principles and authorities, and seems to have proceeded on the doctrine in *Lewis Bowles'* case; and it may be added, that the decision of *Plunket v. Holmes* has been much doubted by very great lawyers.

Bayley Serjt. *contra* was stopped by the Court.

Lord ELDON Ch. J. There can be no doubt that if this be a contingent remainder it will have been destroyed by the operation of the fine, but if it be a vested remainder or an executory devise no such effect will have taken place. In my opinion the devise of the fee to *C. Benger* is contingent, and the devise of the fee to *G. Lane* is contingent also. This is not like the cases last cited by my Brother *Williams*, particularly of *Hooker v. Hooker*; there the estate being limited to *A.* for life, and after his death to *B.* the heir at law of *A.* for life, and then without any estate to preserve contingent remainders to the first and other sons of *B.* in tail, reversion to *A.* in fee, *A.* died, in consequence of which the reversion in fee, which was parcel of the inheritance, descended on *B.* and the question was, Whether his life estate was thereby merged? The Court there held that it was merged, and that the contingent remainders never came into existence, the particular estate on which they depended having determined before the contingency had taken place. If I understand the reasoning on which the case of *Plunket v. Holmes* proceeds, it is this, that a particular estate was there given to the heir at law, which was an estate of freehold and not an estate in fee; and then an estate in fee was given upon a contingency to the second son if it happened one way, and to the heir at law if it happened the other, which was a contingency applying to two separate devises. That therefore was not like the case where the heir at law takes an estate in fee by express devise or by executory devise inferred from a condition of which no one but himself can take advantage. In determining what was the intent of this testator we are not to take into consideration that *G.*

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Lane the heir at law had an estate independent of the effect of the will. The fee devised to *G. Benger*, and that devised to *G. Lane*, being both contingent, there was an estate somewhere not depending on a contingency; and that estate was in *G. Lane* as heir at law. In the case of *Plunket v. Holmes* the Court would not hold that the estate for life limited to the heir at law was merged by the subsequent limitation to him of a contingent remainder in fee; for that remainder was not executed. They held therefore, that the eldest son took an estate for life; which estate for life being sufficient to support the remainder in fee to the second son, and also the remainder in fee to the eldest son as contingent remainders, they determined that these limitations should be supported as contingent remainders. The estate for life by which these contingent remainders were supported having been destroyed by the recovery before the contingency had taken effect, the contingent remainders were destroyed also; and the heir at law came in by virtue of that reversion which descended to him independent of the will. With respect to the cases which have been cited relative to conditions, I take it to be fully settled that a condition is to be construed to be precedent or subsequent as the intent of the testator may require. But there is a wide difference between those cases in which this rule of law is to be applied to conditions, and those in which we find a limitation preceded by an estate of freehold sufficient to support it as a contingent remainder. Lord *Kenyon* has laid it down, that where a limitation may be construed as a contingent remainder, it shall not be considered as an executory devise (a): and that on principles of policy the Court is rather to suppose that the testator intended to give a contingent estate, than an estate upon condition. With respect to the case before Lord *Talbot* it is not applicable to this, for as the first estate was an equitable estate-tail in possession, a recovery suffered would have barred all remainders whatever, and consequently all argument respecting the policy of construing the subsequent limitation to be a vested remainder on condition, a contingent remainder, or an executory devise was excluded. It was argued that the second estate was a legal estate, and consequently not barrable by a recovery of the equitable estate, but his Lordship only determined them both to be equitable estates, and the latter to be as well bound by the recovery as the former. In *Edwards v. Hammond*, it was matter of necessary implication that the estate should

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(a) See *Doe d. Maffei v. Morgan*, 3 T. R. 765.—See also *Parsley v. Rogers*, 2 Saund. 388.—And *Jess v. Legge*, 3 T. R. 489. in *notis*.

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vest in the eldest son during his infancy; for whatever might be the construction of the prior words; it was clearly expressed that unless the son died before twenty-one the estates should not remain to the surrenderor. So in *Haynsworth v. Pretty*, the proviso to pay legacies was necessarily holden to create an executory devise to the legatees on failure of payment, because if it had not been so, nobody but the eldest son could have taken advantage of the breach of the condition. I am not sure whether there is not a class of cases which decides that where an estate is given to a man for life, and from and after his death to another for life *in case he survives*, the latter is not a contingent but a vested remainder: for being an estate for life the enjoyment of that estate must necessarily depend upon the second devisee surviving the first, and therefore the words "in case he survives" being in such case necessarily included in the preceding words "from and after his death," they shall not convert a vested into a contingent remainder (a). But here the second estate is given in fee, and it is therefore impossible to argue from the duration of the estate, that in the present case the words "in case she the said C. Bengier shall survive and outlive my said brother" are necessarily included in the preceding words "from and immediately after his death." With respect to the arguments which have been used to shew that the limitation to C. Bengier is an executory devise, I take this distinction to be clearly settled, that where a fee is given to the first taker, and afterwards an estate in fee is limited to some other person, the Court will construe the latter to be an executory devise, provided it be limited to take effect within the time prescribed by the rules of law; but where a freehold only is given to the first taker and afterwards a fee is limited upon a contingency, the subsequent devise is in the nature of a remainder, and being capable of being supported by the precedent freehold estate as a contingent remainder, it shall not be deemed an executory devise. The argument of my Brother Williams, if admitted, would overthrow the practice of every day. For if an estate be devised to the eldest son for life, remainder to the first and other sons of such son in tail, without the interposition of trustees to support contingent remainders, remainder to the heirs of such eldest son; it is clear that such eldest son, though he be heir at law, takes an estate for his life, and if by fine or any other act he destroys such life estate, the limitations to his first and other sons will never take effect. The result of the case is this; the testator gives

(a) See *Webb v. Haring*, Cro. Jac. 415. also *Fearne's Contingent Remainders*, p. 367.

an estate for life to his brother, and if *C. Bengier* survives her brother he gives her an estate in fee; but on the contrary, if *C. Bengier* does not survive his brother he gives his brother an estate in fee. The brother being tenant for life, destroys his life estate before the contingency of survivorship has taken place; consequently the remainders depending thereon are destroyed, and the brother comes in as heir at law.

HEATH J. I am of the same opinion. Two questions have been made in this case; first, Whether the condition be precedent or subsequent? Secondly, Whether the devise to *C. Bengier* be a contingent remainder or executory devise? It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction according to the intent of the devisor. The question always is, Whether the thing is to happen before or after the estate is to vest? If before, the condition is precedent; if after, it is subsequent. In this case it is clear that the event is to happen before the estate can vest: for the brother is to die before *C. Bengier* can be entitled to the estate, the words being "in case the said *C. Bengier* shall survive and outlive my said brother, and not otherwise." In all the cases which have been cited to prove this a condition subsequent, the intent of the testator has been clear that the estate should vest immediately in possession. Such was the case before Lord *Talbot*, and such was the case of *Edwards v. Hammond*. This case therefore is distinguishable from the cases cited, since in those cases the estate was not intended to vest in possession immediately. As to the second question, it has been decided so long ago that it will not admit of discussion. The case is not distinguishable from *Plunket v. Holmes*. Where a freehold is limited to the first taker and afterwards a fee is given on a condition, if it may take effect as a contingent remainder it shall do so; and it is not material that a fee might have descended to the first taker independent of the will.

ROOKE J. I am of opinion that this is a contingent remainder, and I found that opinion on the case of *Plunket v. Holmes*. It was the intent of the testator that *G. Lane* should take for life, and that after his decease *C. Bengier* should take an estate in fee if she survived him, but if she did not survive him that *G. Lane* who was the heir at law should take an estate in fee. Here therefore there was a particular estate for life, which was sufficient

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to support the devise over as a contingent remainder; and it is a settled rule of law that where the Court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise.

CHAMBRE J. I am of the same opinion. The case is perfectly clear both on reason and authorities.

Judgment for the Defendant.

Nov. 18th.

GARNHAM, Executrix, v. HAMMOND.

If a Plaintiff executor hold a Defendant to bail upon an affidavit stating the debt to be due, "as appears by the testator's books," but omitting to add, "and which the deponent believes to be true;" the Court of C. B. will allow the Plaintiff to swear to his belief in a supplemental affidavit.

THE Plaintiff having held the Defendant to bail upon an affidavit, which stated that the Defendant was indebted to the Plaintiff in his character of executor, "as appeared by the testator's books;" a rule was obtained calling on the Plaintiff to shew cause why the Defendant should not be discharged on entering a common appearance.

Cockell Serjt. now shewed cause, and urged that although the affidavit which had been made must be considered as insufficient in its present form, for want of the words "and which the deponent believes to be true (a)"; yet that, consistently with the practice of this Court, a supplemental affidavit might be allowed in order to remove this objection; and cited *Roche v. Carey*, 2 Bl. 850. as precisely in point (b).

Best Serjt. on the other side insisted that a supplemental affidavit could never be allowed except for the purpose of explaining an ambiguity in the original affidavit for the satisfaction of the Court: and referred to *Green v. Redshaw*, ante, vol. 1. p. 227. where Eyre Ch. J. said, "If it were allowed in this case, it would be making that right which was wrong at the time when it was done, and would be in the nature of an amendment" (c).

The

(a) See *Barclay v. Hunt*, 4 Burr. 1992. *Sheldon v. Baker*, 1 T. R. 83. and *Swayne v. Grammond*, 4 T. R. 176.

(b) See also *Hobson v. Campbell*, 1 H. Bl. 245. where the Plaintiff after stating in his affidavit to hold to bail, a bond of the Defendant conditioned for payment of bills which should be returned from India protested for non payment, alleged that certain bills were returned protested for non-acceptance; and the Court held that the defect

might be remedied by a supplemental affidavit.

(c) In *Reeks v. Grossman*, 2 Wils. 224. C. B. where the Plaintiff's affidavit had stated that the Defendant "is justly indebted," instead of "is justly indebted," and a supplemental affidavit was produced, the point was much debated, Lord Ch. J. Pratt and Bathurst J. at first inclining to allow it, but Clive and Gould Js. opposing it, because as the first was no oath at all, it could not be made

The Court gave leave to the Plaintiff to file a supplemental affidavit.

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made good by any supplemental affidavit. Afterwards the case being argued a second time, the supplemental affidavit was refused, Lord Ch. J. Pratt adopting the opinion of *Clive* and *Gould* Js. and saying that the Court "had never gone so far as to admit

a supplemental affidavit, where the first amounted to no oath at all, but had only supplied small defects in affidavits which had not been quite full enough." *Bathurst* J. retained his former opinion.

HOSIER v. SEARLE.

Nov. 18th.

DEBT on bond.

The Defendant prayed oyer of the bond, which appeared to be a joint and several bond of *R. Gilder*, the Defendant, and one *Robert Kent*, the condition of which was, "that if the above bounden *R. Gilder* his executors administrators and assigns do and shall well and truly pay observe perform fulfil and keep the rent and all and singular the payments covenants articles clauses and agreements whatsoever which on the part and behalf of the said *R. Gilder* his executors administrators or assigns are and ought to be paid observed performed fulfilled and kept comprised or mentioned in a certain indenture, bearing even date with the said obligation, made or expressed to be made between *J. Hosier J. Carter &c.* thirteen of the trustees appointed to put in execution an act of parliament made &c and entitled &c of the one part, and the said *R. Gilder* of the other part, in all things according to the true intent and meaning of the same; then the above written obligation shall be void otherwise the same shall remain in full force." He then pleaded, first, *non est factum*; secondly, "that before the making of the said writing obligatory in the said declaration mentioned, to wit, on the day of the date of the said writing obligatory at, &c. it was agreed by and between the said Plaintiff as one of the trustees for putting in execution the said several acts of parliament in the said condition of the said writing obligatory mentioned, and the said *Robert Gilder* in the said condition also named, that a certain indenture of lease should be made and granted to the said *Robert Gilder* by a competent number of the said trustees of certain tolls and duties in the said acts mentioned for a certain term of years, at and

Debt on bond conditioned for the performance by *R. G.* of all the covenants on his part mentioned in a certain indenture, bearing even date with the bond, made or expressed to be made between the Plaintiff and the said *R. G.* Plea that before the execution of the bond it was agreed that the Plaintiff should grant to *R. G.* a lease under certain covenants, and that the Defendant should enter into a bond as surety for the performance of those covenants; that the Defendant did accordingly enter into the bond on which the action was brought, and that the indenture mentioned in the

condition thereof is the lease so agreed upon and no other; but that the said lease never was executed. Held on demurrer that the Defendant was stopped by the condition of the bond from pleading this plea.

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under a certain rent and upon and subject to certain covenants to be respectively reserved and contained in the said lease; and that the said *Robert Gilder* and the Defendant and the said *Robert Kent* in the said writing obligatory mentioned, as his sureties should make and execute the said writing obligatory in the said Declaration mentioned, by way of security for the payment of the said rent and the performance of the covenants to be mentioned in the said intended lease; and the said Defendant in fact further saith, that the said agreement being so made as aforesaid, he the said Defendant and the said *Robert Kent* as such sureties as aforesaid, of and for the said *Robert Gilder* in pursuance and performance of the said agreement and on no other account and for no other consideration whatsoever, afterwards to wit, on the same day and year in the said declaration mentioned, made and executed the said writing obligatory in the said declaration mentioned with such condition as aforesaid thereto subjoined; and the said Defendant in fact further saith, that the said indenture in the said condition mentioned was and is the very same indenture which was so agreed to be made and granted unto the said *Robert Gilder* as aforesaid and no other or different indenture; and that although such indenture was and is in manner aforesaid in the said condition alleged to have been made, yet in truth and in fact no such indenture nor any other lease whatsoever of the aforesaid tolls and duties before or at the time of making the said writing obligatory had been or was nor hath as yet been made or executed by and between the said several trustees in the said condition of the said writing obligatory named, or any other of the trustees for putting in execution the aforesaid acts of parliament of the one part, and the said *Robert Gilder* of the other part; nor hath the said *Robert Gilder* as yet executed or accepted any such lease or entered into or executed the said writing obligatory, and this, &c. wherefore," &c. 3dly, "That no such indenture as was and is in the said condition of the said writing obligatory alleged to have been made, was or hath been as yet made or executed as was and is by the said condition above supposed, and this, &c. wherefore," &c.

The Plaintiff joined issue on the first plea, and demurred generally to the two last.

Shepherd Scrjt. in support of the demurrer. The Defendant is estopped by the condition of his bond from averring that no such indenture was executed as that referred to in the condition; the

the distinction established by the course of authorities being this, viz. that where the condition refers to a generality, the party may aver that the matter referred to does not exist, but were it refers to a precise thing as in existence at the time of the bond given, the obligor is estopped from denying its existence; thus where a bond was conditioned to pay all the legacies which J. S. had devised by his will, the Court held that the Defendant was estopped from saying that J. S. made no will, but that he might say that J. S. gave no legacies by his will, *Paramoure v. During, Moor, 420.*; to the same effect is *Willoughby v. Brook, Cro. Eliz. 756.* where the Court say, if a man be obliged to perform the covenants in an indenture on his part to be performed, it is not any plea to say there were not any covenants therein to be performed; so in *Jewel's case, 1 Rolle Rep. 408. 1 Rol. Abr. 872. l. 30.* *Rainsford v. Smith, Dy. 196.* and *Hart v. Bulkminster, Sty. 103.* But in *King v. Perseval, 1 Rolle Rep. 430. 1 Rol. Abr. 872. l. 25.* the condition being to perform all the agreements already set down by J. S., the Defendant was allowed to plead that no agreement was made because it was in the generality; and the same distinction was recognized in *Stowd v. Willis, Cro. Eliz. 362.* and *Paine v. Shettroppe, All. 13.* These cases were reviewed and the doctrine confirmed in *Shelley v. Wright, Willes, 9.* and *Coffens v. Coffens, Willes, 25.*

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Marshall Serjt. contrd. Admitting the proposition that where the condition of a bond recites an actually existing indenture, the obligor cannot deny that indenture, yet unless it appear on the face of the condition that such an indenture did actually exist, the Court will not support this demurrer in favour of an estoppel; for "estoppels are odious in law and admitted merely out of necessity, because they are concluding to speak the truth," *Skipwith v. Green, 8 Mod. 312.* The words of this condition only import, that if such an indenture be made and the Defendant shall keep the covenants therein, the bond shall be void; but *non constat* that the lease was not to have been executed after the execution of the bond on the same day, in which case if the obligor had refused to execute the lease it would have been impossible to perform the condition of the bond. Now though he might be estopped from saying that there was no such deed, yet it appears from *Skipwith v. Steed, Cro. Eliz. 769.* that he was at liberty to plead that he had never executed such a deed. In that case the

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Defendant to debt on bond conditioned for the performance of covenants in an indenture between *W. S.* and *Anne* his wife on the one part, and the Plaintiff on the other part, pleaded the indenture as an indenture of *W. S.* and *Anne* his wife, whereas the feme never sealed it; the Plaintiff therefore replied *non fuit facta* between *W. S.* and *Anne* his wife on the one part and himself on the other, and it was found for him by the jury; and the Court held that the Plaintiff was not estopped from shewing the deed not to be the deed of baron and feme, but that he was estopped to say there was not any such indenture. 2dly, Since the 8 & 9 of *W. 3. c. 11. s. 8.* is compulsory upon a Plaintiff in a case like this to suggest breaches upon the roll (*a*), until which he can have no remedy upon the bond, and since it is impossible to suggest breaches of covenants never entered into, the Court will not pronounce a judgment for the Plaintiff from which he can derive no advantage.

Lord ELDON Ch. J. said, the present opinion of the Court is, that the Defendant is estopped by the condition of the bond. In addition to the arguments at the bar it may be observed, that the condition of the bond is for the performance of covenants comprised in a certain indenture *made or expressed to be made* between the trustees and the Defendant. The object of introducing the words “made or expressed to be made” seems to have been, that whether the execution of the indenture could be proved or not, the covenants contained in the paper writing which purported to be an indenture between the trustees and the Defendant should be considered as the covenants of the Defendant.

The Court having taken time to consider, on this day, gave

Judgment for the Plaintiff.

(*a*) *Drage v. Brand*, 2 *Willf.* 377. *Goodwin v. Crowle*, *Consp.* 357. *Roles v. Rosewell*, 5 *T. R.* 538. and *Hardy v. Bern*, *cit.* 5 *T. R.* 540.

Nov. 22d.

TIPPING v. JOHNSON.

To a replication of *nul tiel record* and day given, if the Defendant demurs, the Plaintiff need not join in demurrer; but if the record is not produced, may sign judgment.

THE Defendant in this case having pleaded judgment recovered, the Plaintiff replied *nul tiel record* and gave a day to produce the record. To this plea the Defendant demurred; the Plaintiff did not join in demurrer, but finding that the record was not produced at the day, signed judgment.

A rule

A rule having been obtained by *Cockell* Serjt. calling on the Plaintiff to shew cause why this judgment should not be set aside for irregularity,

Shepherd Serjt. shewed cause, and insisted that where the Plaintiff replies *nul tiel record* and gives a day (a), it makes a complete issue; and that the demurrer was therefore improperly put in by the Defendant.

Lord ELDON Ch. J. (after referring to the officers) said; that the replication constituted a complete issue of fact, and that the judgment was therefore regular.

Per Curiam,

Rule discharged (b).

(a) This seems the proper method of concluding the replication where the record is of the same count. *Cramer v. Wickatt*, 1 *Ld. Raym.* 550. *Carth.* 517. S.C. Where the record is of another count, it has been held correct to conclude with a verification; though it appears that either way will do.

Cramer v. Wickatt, *ubi supra*. *Sanford v. Rogers*, 2 *Wils.* 113. *Barnes* 161. ed. 1798. and *Newberry v. Stradwick*, *Barnes*, 161. and 335. *Com.* 533. S.C.

(b) See *Fox and others v. Lewing*. *Cooke Cas. Pr.* 56. *Pr. Reg.* 227. and the cases cited in the preceding note.

THOMPSON v. Lady LAWLEY and Others.

Nov. 24th.

THIS was a case sent by the Lord Chancellor for the opinion of this Court.

Bielby Thompson Esq. being seised in fee of the manor of *Wheldrake* in the county of *York*, and other real estates, and also possessed of a considerable personal estate, including among other things, two leasehold houses one situate at *Putney* in *Surry* and the other in *Mortimer Street Cavendish-Square*, holden on beneficial leases (in each of which about 70 years were unexpired (a),) on the 28th *May* 1794 duly made his will, attested so as to pass real estates. After directing that his funeral expences debts and legacies should be paid out of his personal estate, but if his personal estate should not be sufficient to pay the same his real estate should be charged with the deficiency, he gave and devised his manor of *Wheldrake* and all other his manors messuages lands tenements and hereditaments to trustees therein named and their heirs to the uses upon and for the trusts intents and purposes therein mentioned, that is to say, as to his said manor of *Wheldrake* and all his other tenements and hereditaments in the parish of *Wheldrake* to the intent that his

Under a general devise of all manors messuages lands tenements and hereditaments, leasehold messuages will not pass, unless it appear to have been the evident intent of the deviser that they should pass.

(a) This fact was admitted though not stated in the case and indeed as the whole will was taken as part of the case though

many parts relied upon in the judgment were not introduced at first, they are now added.

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wife should receive thereout during her life the yearly sum of 200*l.* in addition to the yearly sum of 800*l.* provided for her by his marriage settlement, and that certain other persons therein named should receive the annuities thereby provided for them, and he then devised as follows, that is to say "as for and concerning the said manors messuages and other hereditaments so charged with the said annuities with all their rights members and appurtenances and as for and concerning all other his manors messuages lands tenements and hereditaments with their rights members and appurtenances in the said county of *York* or elsewhere in the kingdom of *Great Britain*, to the use of his first and other sons in tail male and for want of such issue to the use of his first and other sons in tail general remainder to his daughters in tail as tenants in common if more than one, with cross remainders, and for want of such issue to the use of his brother *Richard Thompson* and his assigns for his life without impeachment of waste, remainder to the said trustees to preserve contingent remainders, remainder to the use of the first and other sons of the said *Richard Thompson* successively in tail male, remainder to the use of *Paul Beilby Lawley* the third son of his sister *Lady Lawley* for life, remainder to his first and other sons in tail male, remainder to the use of *Francis Lawley* the second son of his said sister for life, remainder to his first and other sons in tail male, remainder to the use of *Sir Robert Lawley* the eldest son of his said sister for life, remainder to his first and other sons in tail male, with the ultimate remainder to his own right heirs." Then followed a proviso, that if *P. B. Lawley* or *F. Lawley* should succeed to the premises they should take the name and arms of *Thompson* and other provisos empowering the several devisees to jointure and to raise portions by demise or mortgage redeemable by the person who for the time being should be intitled to the freehold and inheritance. He then limited an estate in *Nottinghamshire* to other persons and after having declared that it was his intention to have given his wife the choice of any one of his mansion-houses in *Yorkshire* or *London*, or the house that he had lately purchased at *Putney*, but that she had declined the acceptance of either of them, and would have no house of her own to go to after his decease, gave her therefore 5000*l.* He then, after giving several legacies, expressed himself as follows, "Lastly, I give and bequeath all my monies securities for money goods chattels and effects and all other my personal estate not herein before by me disposed of, or to be disposed of by any codicil or codicils to this

my will unto my said brother *Richard Thompson* and unto my sister *Lady Lawley* in equal shares and proportions:" and he appointed his said brother and sister executor and executrix of his will.— The testator died on the 10th *June* 1799, without having revoked his will. The question for the opinion of the Court was, Whether the leasehold houses and premises late belonging to the testator in *Mortimer-Street Cavendish-Square*, and at *Putney in Surry* passed by his will under the general devise of all his manors messuages lands tenements and hereditaments with their rights members and appurtenances in the county of *York* or elsewhere in the Kingdom of *Great Britain*?

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Bayley Serjt. for the Plaintiff. In the first place the leasehold property can only pass by way of executory devise, and being limited after an indefinite failure of issue, the limitation as an executory devise is too remote. Independent of this consideration, however, it may be stated as a general proposition, established by a long series of cases, that where a man is possessed of freehold and leasehold property, the leasehold will not pass by a general devise applicable to freehold, unless an intention that they should pass can be collected from the face of the will, or from the nature of the leaseholds themselves. It was resolved in *Rose v. Bartlett*, *Gro. Car.* 292: "that if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only and not the lease for years: and if a man hath a lease for years and no fee simple, and deviseth all his lands and tenements, the lease for years passeth; for otherwise the will should be merely void" (a). This case is a leading authority, and the doctrine has been recognized in a variety of subsequent decisions. The case of *Davis v. Gibbs*, where the same proposition was adopted, was first decided at the Rolls, as appears from *Fitzg.* 116. and that decision was afterwards confirmed by the Lord Chancellor, and on appeal from him, by the House of Lords. 3 *P. Wms.* 26. The words used in that case were particularly strong, being "manors messuages lands tenements hereditaments and real estates whatsoever of which the testatrix was any ways seized or entitled to", which last expression might seem to apply to leasehold estate. Lord *Hurdwicke* in *Knotsford v. Gardiner*, 2 *Atk.* 450. cites the case of *Rose v. Bartlett*, and adds, that although in the case before him he had no doubt at all of the intention of the testator, yet the rule of law must prevail, and directed an issue to try whether the testator at the time of making his will had both freehold and lease-

(a) Indeed leasehold houses will pass under a devise of all the testator's freehold houses in *A.* if he had no leasehold houses. *Day v. Trigg*, 1 *P. Wms.* 286.

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hold estates. The opinion of Lord *Hardwicke* respecting this rule of law is shewn still more strongly in *Chapman v. Hart*, 1 *Vez.* 271. for the will in that case having been executed in the presence of two witnesses only could not pass the real estate, and yet his Lordship held that the devise of all his lands and tenements must, according to *Rose v. Bartlett*, be confined to the freehold estates, and that therefore the leasehold would not pass. These cases are confirmed by *Pissol v. Riccardson*, K. B. Hil. 1784. 2 *Cox's P. Wms.* 459. n. 1. 111. *El.* 26. in *notis*, S. C. where Lord *Mansfield* observed, that a system of legal construction had been established by former cases, especially *Rose v. Bartlett*, and *Davis v. Gibbs*, which precluded the Court from considering the intention of the testator on the words of the devise as they otherwise might have done, and bound them in their decision of the principal case. Yet in that devise the words "seised of interested in or intitled unto" might seem applicable to leasehold as well as freehold property. It was indeed lamented by Lord *Kenyon* in *Lane v. Lord Stanhope*, 6 *Term Rep.* 353. that the case of *Addis v. Clement*, 2 *P. Wms.* 456. was not cited in *Pissol v. Riccardson*, since his Lordship seemed to think that Lord *Mansfield* might have been induced by the authority of that case to have decided otherwise. But it appears from a manuscript note of *Pissol v. Riccardson*, that the case of *Turner v. Husler* (a), which proceeded on the authority of *Addis v. Clement*, was noticed by Lord *Mansfield* in his judgment, who received his account of it from Mr. Baron *Eyre*: it is therefore to be inferred, that the case of *Addis v. Clement*, had it been cited, would not have altered his Lordship's opinion. It is to be observed, however, that the case of *Addis v. Clement* is very distinguishable from the present. Lord Chancellor *King* observed, that the words "possessed of or interested in" properly referred to a leasehold, and expressly distinguished the case before him from *Rose v. Bartlett* on that ground; and his Lordship further relied on the circumstance of the leaseholds being perpetually renewable, which he thought might have induced the testator to look upon himself as having a kind of inheritance. This last circumstance also distinguishes *Turner v. Husler* from the present case; for there the leasehold tithes were perpetually renewable without fine, and Mr. Baron *Eyre*'s opinion appears to have been founded on the ground of the testator's intention to pass the leasehold, inferring that the resemblance which those particular leaseholds bore to an inheritance made the testator forget the distinction. With respect to *Lane v. Lord Stanhope* it might be sufficient to say, that the word "farm"

(a) Reported 1 *Bro. Cha. Cas.* 78.

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there used, was particularly descriptive of leasehold property, if it was not clearly distinguished from the present case by another circumstance, namely, that the freehold and leasehold property was so blended together that it was quite impossible to suppose that the testator could have intended to separate them. The case of *Loveth v. Cavendish*, Amb. 356. was decided simply on the ground of intention apparent on the face of the will that the leaseholds should pass. In the present case it is impossible to discover any intention of the testator expressed upon the face of his will to pass the leasehold. All the limitations are applicable to freehold property only; and the words "executors and administrators" never once occur. Besides, as the lands, &c. are limited by the general devise to trustees to uses, if the leaseholds were included in this devise, the legal property of the freehold would go to one person and of the leasehold to another; for the use of the former would be executed in the *cessuy que use* by the statute, whereas the legal estate in the latter would remain in the trustees.

Runnington Serjt. for the Defendants. The general terms used in the clause in question are sufficient to pass the leasehold together with the freehold property. Though in *Rose v. Bartlett* the language used is undoubtedly very strong in support of the argument urged on the other side, yet subsequent to that case the rule has been varied in many instances, and the Courts have inclined to decide, that where they can collect from the will that it was the intent of the testator to pass his leasehold together with his freehold property under a general clause of this kind, the leasehold is passed accordingly. In *Turner v. Huster* Mr. Baron Eyre observes, that the determination of *Rose v. Bartlett* was very early, and that he was lead to think it arose from the old idea of the dignity of the freehold, and the small value of the *interesse termini*; but that from the change of circumstances the rule was become unsatisfactory. *Davis v. Gibbs* was decided on the intent of the party devising, the clause in dispute being a devise of all "manors messuages lands tenements hereditaments and *real estate*" and there being another clause under which the leasehold evidently passed. Though the general rule is recognized in *Knotsford v. Gardner*, and *Chapman v. Hart*, yet in *Pistol v. Riccardson* the observation of Lord Mansfield, that nothing appeared in the will indicating an intention to pass the leaseholds, seems to shew, that if any such intention could have been discovered, his Lordship would have held the words of the devise sufficiently comprehensive. Certain it is, that *Addis v. Clement* was not referred to in that case; and in *Lane v.*

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Lord Stanhope Lord *Kenyon* observes, that in *Pistol v. Riccardson* Lord *Mansfield* seemed to feel himself pressed by a torrent of authorities, and that if *Addis v. Clement* had then been mentioned the Court would have decided the other way with less reluctance, and that the ground of determination was, that all the words there used had received in other cases a certain technical construction. That case of *Lane v. Lord Stanhope*, if correct, has put the question at rest, inasmuch as the word "farms" was there held to pass the leaseholds, as it appeared from the circumstances of the case, that the testator must have intended them to pass. The strict rule therefore laid down in *Rose v. Bartlett* is no longer the governing principle, but the intention of the testator must prevail, and if the words of the will are sufficiently general to include leasehold, the Court will not restrain them. Here the words are as general as possible, being his "manors messuages lands tenements and hereditaments", and if in *Turner v. Huffer* the word "tithes", and in *Lane v. Lord Stanhope* the word "farms", were held to carry leasehold, why should not the word "messuages" in this case? Here the testator had 70 years to run in the leaseholds, which amounting to the value of the whole fee, he might look upon them in the light of freehold property. It has been objected that the strict limitations in this will, not being applicable to leasehold property, shew that the testator did not intend the leaseholds to pass in a clause the contents of which are made subject to those limitations: but the same limitations existed in those Equity cases, where due weight was given to intention. Having given 5000*l.* to his wife in lieu of these very leaseholds, it is clear that he had them in contemplation at the time of making his will, and if he had not supposed them to pass under the general clause they would have been specifically mentioned in the residuary clause.

Lord ELDON, Ch. J.—Though the Court is not called upon in this case to state the reasons for the certificate, which it is disposed to return to the Lord Chancellor, yet, as it has not been unusual upon similar occasions to mention the grounds upon which the opinion of the Court has proceeded, I shall follow the example of Lord *Kenyon* in *Lane v. Lord Stanhope*, and state my reasons for thinking that the leaseholds do not pass under the general devise of the testator's manors, messuages, &c. I adopt the words of his Lordship in that case, "It is our duty in construing a will to give effect to the devisors intention as far as we can consistently with the rules of law, not conjecturing but expounding his will from the words used." And I am particularly impressed with the

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latter expression "not conjecturing, but expounding his will from the words used." I will first consider this will, as if the construction was unprejudiced by any rule of law, or by any decisions in which distinctions respecting such rules may have been taken. When we find limitations in a will, inapplicable to personal estate, though we are not thereby authorised to say that the personal estate shall not pass, provided the testator has used words clearly sufficient to pass it; yet the acknowledged inapplicability of those limitations to personal estate is a circumstance from which the intent may be collected if the words of devise are ambiguous. In an accurate sense when a man says "my lands and hereditaments" he means those which are throughout his own. When therefore we see limitations which apply to real estate as distinguished from personal estate, or even when we find that by holding the latter to be included in the general devise the wish imputed to the testator to give it to the same person as the freehold may not, by virtue of such limitations, be gratified for above one moment; we may consider the nature of the limitations as affording strong evidence that the testator really had not the intention that the personal estate should pass. I consider the whole of this will, as part of the case referred. I find no circumstance stated which goes beyond the mere fact, that the testator was possessed of two leasehold houses, for terms of about 70 years. It does not appear that there was any equitable right of renewal, nor were the premises in question blended in enjoyment or otherwise, with any freehold land; there is no difficulty in distinguishing them from each other; they have never been demised together at one rent reserved to heirs; they are short terms. No one of those particular circumstances which were relied upon in former cases exists in this: it is the simple case of terms for years, and a case of property, *prima facie*, that sort of property which a disposition of personal estate must be intended to pass. In this will, in the first place, the testator directs that his debts and funeral expences shall be paid out of his personal estate, but if that shall not be sufficient, he charges his real estate with the deficiency. Here in the beginning of the will then a distinction between real and personal estate is introduced. In the last clause of the will he devises "all his money securities for money goods chattels effects and all other his personal estate not therein before disposed of or to be disposed of by any codicil." It has been observed, that by the words "personal estate," in this last clause, must be meant personalty *eiusdem generis* with money, &c. But am I conjecturing, or am I

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expounding when I say that he meant one thing by the words "personal estate" at the beginning of the will, and another by the same words at the end? Look at this in another point of view; the general rule respecting the application of assets is very much like that which the testator has here appointed. First, the personal estate is to be applied, and then the real. But the personal estate so to be applied is the personal estate not specifically disposed of. Now if the leaseholds in question passed with the freeholds, then those leaseholds are specifically disposed of; and if the personal estate not specifically disposed of should happen to be insufficient for the payment of debts, out of what fund and in what manner are we to suppose that the testator has directed them to be paid? He has settled his different freehold estates on different persons. If therefore it be necessary to resort to the real estates for payment of debts, a valuation of them must be taken, and they must contribute *pro rata*; but personalty specifically disposed of must also contribute; and then in the construction of a will which says, the personalty is first to be applied, we are, if the general personal estate is insufficient, to consider it as agreeable to the testator's intention, though he has not bequeathed his leasehold estates *eo nomine*, that they should be preserved as anxiously as the freehold, and should only contribute together with them, according to their value. With respect to the word "messuages" as used in this will, it is to be observed, that in the devise of the manor of *Wheldrake* it is most clearly applied to freehold estate only: and therefore there is no reason to suppose, that when he used the same word in the general clause, under which it is contended that the leaseholds pass together with the freeholds, he meant to apply it in both those species of property. The estates included in the general devise are limited to the issue (if he should have any) of the devisor in tail, with several remainders over: now if the devisor had left a son living at the time of his death, and that son had died instantly afterwards, the leasehold property would have been necessarily separated from the freehold, since the former would have gone to the administrator of such son, and the latter would have vested in the remainder-man. Why are we then to be so anxious to impute intentions to testators, the gratification of which they use means and terms so little calculated to secure? It was observed, that the limitation being after failure of issue of his body was too remote: but attending to his real intention, and the case of *Pelham v. Gregory* (a)

(a) 5 Bro. Parl. Cas. 435.

in the House of Lords, we might hold, that if he had issue, the leasehold would vest in the issue, and if he had none in actual existence at his death, the leasehold, if it vested in the after-takers, would be subject to be divested as soon as any issue of his should come into actual existence. In that part of the will where a power is given to charge the estates devised with portions for younger children, it is clear he meant the power should extend to all the property which he devised under the general words; but he provides that if such portions shall be raised by demise or mortgage the same shall be redeemable by the person entitled to the freehold and inheritance of the demised or mortgaged premises: he thought therefore that he had an inheritance in the property he devises, and which he gives a power of mortgaging. Then follows the only clause which could suggest any doubt to an unlettered mind; in which the deviser declares that it was his intention to give his wife the choice of one of his mansion-houses in *Yorkshire* or *London*, or the house that he had lately purchased at *Putney*, but that she had declined it, and that he therefore gave her 5000*l.* Now although the wife might have chosen the *Yorkshire* house, which was a freehold; yet it is observable that, as his will finally stands, the compensation is taken out of the personal estate: and it seems not unreasonable therefore that the residuary legatees who are to pay that 5000*l.* should take the leasehold in lieu of it. By the last clause the testator gives "all his personal estate not herein before disposed of, or to be disposed of by any codicil". Now it seems impossible to say, that the words "herein before disposed of" may not be satisfied by the legacies before given; but this testator might mean by a codicil to dispose of those leaseholds, suffering them to pass by the general clause if he made no codicil. As to the argument that the personal estate must mean personalty *eiusdem generis*, I cannot trust my mind with an argument so like a conjecture: the words are large enough to pass personalty of any sort; and I do not understand how that mind reasons, which deems the intention of a testator satisfactorily made out by that kind of argument. I was struck with the observation, that as the property is limited to trustees to uses, the statute draws the legal estate in the freeholds out of the trustees, and vests it in the *cestuy que use*, whereas the legal estate in the leaseholds remains in the trustees. As to the supposed anxiety of the testator, that the two species of property should go together, it is more usual to demonstrate that anxiety either by directing that the leaseholds shall be enjoyed

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together with the freeholds as long as the rules of law and equity will admit, or by introducing very special words and limitations for that purpose, adapted to the nature of the leaseholds. No testator who meant that they should go together, ever made a will under reasonably good advice in its terms so little calculated to produce the intended effect as this testator has done: though in truth a similar observation may be made upon the inefficacy of the terms used to secure such a supposed intention in almost every case, where upon the ground of intention leaseholds have been held to pass under general words. As to the cases; the first mentioned is *Rose v. Bartlett*. It was supposed in *Turner v. Hustler* that the rule there laid down originally obtained on the ground of the small value formerly attached to leasehold interest as opposed to the dignity of the freehold. It may be so, though I doubt whether it was so: but where I do not know the origin of the rule I cannot reason from the supposed causes of the rule, without knowing them, till I allow myself, in that state of uncertainty, to deny effect to the rule. Finding messuages and lands limited to uses inapplicable to leasehold interests, I think I may more safely suppose that the testator intended to pass such messuages and lands as might be limited to such uses. Lord *Hardwicke* seems to have considered the rule acknowledged in *Rose v. Bartlett* to have been a rule proceeding on intention, and to have thought that where a testator gives *his* lands and tenements he must, *prima facie*, be taken to mean those lands and tenements which are strictly his, *viz.* those in which he has an inheritance. Whether the rule laid down in *Rose v. Bartlett* were wisely adopted or not, it is unnecessary for us to determine; but that case having once established a general rule, I had rather consent pointedly and avowedly to contradict that rule in terms than to acknowledge it in words and deny it in effect, by raising distinctions which in fact make it impossible for any man to decide in any particular case what is the legal construction of a will as to this point, till he has obtained the authority of a court of law, in a judgment upon the will, for the opinion which he gives. I observe that the rule has not been denied in any of the cases which have followed *Rose v. Bartlett*. Lord *Hardwicke* in *Knotsford v. Gardiner* speaks of it with the greatest respect; and indeed Mr. *Atkyns* seems to make him speak of it in stronger terms than the rule itself will warrant, since he reports his Lordship to have said, that although he had no doubt

of the intention of the testator, yet the rule of law must prevail. In *Chapman v. Hart*, Lord *Hardwicke* again recognized the rule, and even carried his respect for it so far, that although the will was executed in such a manner as to carry personal property only, yet as the words of the devise were properly applicable to freehold only, his Lordship would not suppose that the testator by those words intended to pass that species of property which could pass by a will so executed. Both in *Addis v. Clement*, and *Davis v. Gibbs*, the rule was expressly acknowledged. It is not my business to consider whether the distinction raised on the former of those cases was fairly sufficient, consistently with the safety of property and titles, to exempt it from the application of the general rule: but when the rule is once admitted I must decide upon my own conviction respecting its applicability to the particular case which comes before me. No doubt, those who decided the cases in which the general rule has been held not to apply, were satisfied that the circumstances before them were sufficient to warrant the exception, and that the exception could be taken with safety to the rules of property: but it is enough for me to say, that none of the circumstances relied on in those cases are to be found in this. I cannot help adding, that if the principle be just, that we are not to conjecture, but to expound, it does appear to me that we do not strictly abide by the rule, that we indulge in what is rather conjecture than exposition, if we are to proceed on suppositions of what the testator may be imagined to have understood as to the nature of his own property, of what he forgot and of what he remembered concerning it; suppositions not founded in his acts or expressions. It is not very easy, in my judgment, to find a sound distinction, sound as obviously consistent with the safety of titles, between the case of *Addis v. Clement* and *Davis v. Gibbs*, if the distinction is to rest only upon such words as "possessed of or interested in," and yet the former of those cases does afford a distinction between that and *Pistol v. Riccardson*, aimed at by Mr. J. *Lawrence* in *Lane v. Lord Stanhope*, namely, that the words "possessed of" occurred in that case, and not in *Pistol v. Riccardson*; and authority has certainly laid stress upon the distinction. Yet it cannot be denied that these words are very frequently, if improperly, used as to freehold as well as leasehold: and if those words follow expressions which, according to the rule, are *prima facie* to be taken to signify

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freehold, as "lands, tenements, and hereditaments," are we sure that we are expounding and not conjecturing when we say that the testator intended to apply them both to freehold and leasehold, though his limitations are ill adapted to leasehold property; and very ill adapted to it if meant to secure, as far as may be, the enjoyment of it together with freehold. And yet the case of *Addis v. Clement* must be understood to proceed upon the word "possessed;" at least the most material reasoning in the judgment proceeds upon it. But the distinction between that case and *Davis v. Gibbs*, and between that case and *Pissol v. Riccardson*, does not rest merely upon such words. The nature of the testator's interest in leaseholds and in renewable leaseholds is very different, and something is due to the consideration, whether the property is or is not blended in enjoyment. It was argued in *Davis v. Gibbs*, that as the testatrix had no freehold interests except in *Kent*, and the general devise related to *Kent*, *Essex*, and *Bucks*, the chattel interests in the two latter countries must pass in order to satisfy the will: on the other hand it was said, that this clause might be satisfied by the fee-simple in *Kent*, and that if the chattel interests passed under it, there would be nothing to satisfy the word "mortgages" in the last clause relative to the personal estate; and the judgment seems to have turned upon this. It must however be observed, that though when a will speaks of lands, it means lands which the testator has at the time of making the will, and it will pass those and those only; yet when it speaks of personalty, it will pass such as the testator shall have at the time of his death, though he had it not at the time he made his will. It seems singular to insist that the words "mortgages and credits" in that residuary clause as to the personal estate, necessarily meant the mortgage for years, and the extended interest which the testator had at the time of making his will; when it must be admitted that if before his death he had parted with them and acquired others, the words would have passed such others though he had acquired them after he made his will. And it is difficult to admit the consistency of that reasoning, which says that the terms "lands in *Kent*, *Essex*, and *Bucks*," are all satisfied by lands in *Kent* only, though he had a mortgage in *Essex* and an extended interest in lands in *Bucks*, and yet at the same time insists that mortgage and extended interest are necessary to satisfy the words "mortgages and credits" in the residuary clause, which would have their operation if the testator had before his death

death any other, and had not at his death that very mortgage or that very extended interest. The argument seems to treat a general residuary clause containing an enumeration of particulars, as if it operated only as a specific bequest of such particulars of personalty as the testator had at the time of making the will, answering in description to the particulars enumerated; though it would operate upon those also which he should afterwards acquire and have at his death. In fact it must often happen that where all personal estate is given, and an enumeration of particulars, unnecessary because all personal estate is given, is added, the testator enumerates some particulars which he has, and many which he has not, and arguments, drawn from intention founded upon the terms occurring in such enumerations are not perhaps of all arguments the most satisfactory, if in truth they are not the least so. In the cases of *Knotsford v. Gardner*, and *Chapman v. Hart*, Lord *Hardwicke* came to very strong decisions in favour of the rule in *Rose v. Bartlett*, and considered it at least as a rule not to be departed from without demonstration plain of the intent of the testator: and when we recollect how thoroughly Lord *Hardwicke* was versed both in law and equity, it is not to be supposed that he was ignorant either of *Addis v. Clement* or *Davis v. Gibbs*. Next came the case of *Lowther v. Cavendish*, which appears to me to be very loosely reported by *Ambler*; and I am not disposed to believe that Lord *Northampton* ever made use of the expressions respecting *Rose v. Bartlett*, which are there attributed to him. We all know that he was possessed of great law learning and a very manly mind; and I cannot but think that he would rather have denied the rule altogether, than have set it afloat by treating it with a degree of scorn, and by introducing distinctions calculated to disturb the judgments of his predecessors and remove the landmarks of the law. But be that as it may, the point on which Lord *Northampton* put the case was, that it was the obvious intention of the testator that one of his name should take all his estates in one county and another in another county; that his general primary intention was to make one great *Cumberland* man, and one great *Yorkshire* man, and that the property in each county, with exceptions, ought to go accordingly. That case therefore is to be considered as a case of exception from the general rule. In *Turner v. Husler*, Mr. Baron *Eyre*, then sitting for Lord *Thurlow*, was of opinion, that by the word "tithes," attending to the nature of the testator's interest in them, and conjecturing what he

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might think about them, both the freehold and leasehold tithes of the testator might pass. In coming to that decision, however, he lays hold of particular circumstances in the case, such as the perpetual interest in the renewal, but he does not at all deny the general rule in *Rose v. Bartlett*, or say that it is to be no longer considered as an authority in the law. Whether that decision be altogether satisfactory I will not presume to say; but thus much I may observe, that I should have had considerable difficulties in the case; and sitting as a judge in a court of equity, I should have felt myself much relieved in being able, in conformity to its practice, and out of respect to the decision of judges and courts in former times, to have asked the opinion of a modern court of law on the subject. This was followed by the case of *Pigot v. Riccardson*, which appears to me to be a case of great authority. Lord Mansfield was very unwilling to come to the decision which he ultimately made; the case was twice argued before him. It has been supposed indeed that his Lordship was not aware of the case of *Addis v. Clement*. Whether his Lordship would have come to a different determination had the case of *Addis v. Clement* been cited, or whether any distinction so satisfactory as to be confidently acted upon is to be found between the two cases, I do not feel myself bound to examine: but it does not appear to me that any very useful purpose would have been served by a contrary decision, considering how short a time even in that case the freehold and leasehold estates would probably have gone together. In all the cases, or almost all of them, the testator has had an intention imputed to him that his freehold and leasehold estates should be kept together, and this has been imputed in cases where the will appears to have been skilfully and artificially drawn. Is it possible if a testator had disclosed such an intention to his man of business, that he would have so inadequately expressed that intention as to use the terms occurring in this case, and in many of the other decided cases? I can hardly say that in any one of them there is an attempt by words or limitations to make the leasehold go together with the freehold as far as the rules of law and equity will admit, that is, to render the leasehold inalienable till about the same time at which a recovery can be suffered of the freehold. Why are we to be anxious to impute an intention which, the testator, if he entertained, has expressed in terms so little calculated to give it effect, that the doctrines of law, operating upon the words which he has actually used, will not permit any court to effectuate it but in a degree altogether

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together short of the extent in which it is imputed to him? The mode of limiting them so that they may go together is familiar to every man of business; that mode is not pursued in any of the cases I have met with; yet in all those cases the wills are ably and artificially drawn: the inference may be thought to be that the intention had not occurred either to the testators or their men of business. The case of *Lane v. Lord Stanhope*, however, furnishes a principle upon which I am disposed to decide the present, because it professes to proceed upon the intent. In that case the freehold and leasehold parts were so blended that they were incapable of being distinguished, and they had been enjoyed together from time immemorial. They had been demised as one term under a rent reserved to the lessor and his heirs. This reservation is a fact from which we may infer that the testator thought the whole his inheritance: it is not a case in which we are conjecturing about his thoughts without acts upon his part to serve as the grounds of conjecture. The premises were also held with a right of renewal. The first taker of the real estate was also the residuary legatee of the leasehold estate: if therefore the testator did not intend that the freehold and leasehold should go together, he must have had this special intent, namely, that the first taker should have an estate for life in the freehold part, and under the residuary clause an absolute interest in the leasehold part; from which circumstance this consequence might have arisen, that when the first taker died there would have been a separation of the different parts of a farm stated to be incapable of being distinguished. That difficulty must have been got over; and if it could not be done in any other way, so many acres must have been set apart (according to the rule of equity) for the freehold interest, and so many for the leasehold. The difficulty however was thought to afford a strong ground for inferring the intention of the testator that the whole should pass together, in a case where he had devised the farm as a farm. In truth the devise of a farm as one entire thing, where the testator had a farm composed of these different parts, is perhaps as sound a ground for the judgment as any in the case. With respect to the supposed intent of the testator that the freehold and leasehold should go together, how imperfectly was that secured in this very case? If the first taker for life of the freehold, and who was intitled to the leasehold either for life by virtue of the limitations, or absolutely as residuary legatee, had a son who had come into existence and continued in it but for a moment, the intended union of enjoyment

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would have been instantly severed between his administrator and the remainder man. If the testator had any intention upon the subject, the carelessness of the person who framed his will, had left it exposed to immediate disappointment, and yet the general tenor of the will bespeaks legal skill in the person who penned it, and skill abundantly competent to secure the execution of the testator's purpose, if he really meant to keep the freehold and leasehold together as long as the law would allow. It is utterly impossible to assert that such an intention is in any reasonable degree effected by the terms of that will. The case of *Rose v. Bartlett*, however, was thought not to apply, because it was conceived that it manifestly appeared not to be the intention of the testator to pass the freeholds only: but it was admitted that if the case had been similar in terms to *Rose v. Bartlett*, the same intention would have been inferred upon the rule of law. The case of *Lane v. Lord Stanhope* was decided on its own circumstances; but this case not only has none of those circumstances, but is as different in circumstances of fact from *Lane v. Lord Stanhope* as any which ingenuity could state. The rule in *Rose v. Bartlett* is a rule which has been acknowledged for ages, and upon which I shall act until I am informed by the highest authority that I am no longer to regard it. Till I shall be so informed I shall substantially regard it in judgment, for I think it better to overrule it all together, which I must not do, than to deny to it its effect upon grounds which do not completely satisfy my mind as solid and safe grounds of distinction.

HEATH J. The case has been so fully discussed by my Lord, that I shall state my reasons very shortly. I have always understood the rule of law laid down in *Rose v. Bartlett* to be a rule of property not to be shaken; and I have often heard it cited and recognised. It is a rule founded on intention; and therefore in the cases cited the judges have proceeded on intention, and where they could collect that the intention of the testator was that both freehold and leasehold should pass, they have so determined. Thus the cases of *Addis v. Clement*, *Turner v. Husler*, and *Lane v. Lord Stanhope*, whether well or ill decided, have all proceeded on special circumstances from whence the intention was collected. It is sufficient to say that no such circumstances occur in this case. Besides, the testator has used the words "messuages" and "hereditaments" in the same sense; and it is therefore to be inferred, that by the word "messuages" he could mean those messuages only which were hereditaments.

reditaments. In some places he says "messuages lands tenements and hereditaments," but in others he says "messuages and *other* hereditaments."

ROOKE J. My opinion is founded on the case of *Rose v. Bartlett*; which I consider as a rule of property not to be shaken. The cases cited in opposition to the rule have all admitted it, but have proceeded on special circumstances. With respect to the rule itself Lord *Hardwicke* expressly said that it was not to be departed from, and Lord *Mansfield* held the same doctrine. I cannot agree that the rule has been so far shaken that the *onus* is to be thrown on the personal representative of shewing that the leaseholds are not intended to pass: on the contrary I think that the leaseholds must be taken not to pass unless special circumstances can be shewn clearly demonstrative of a contrary intent; and no such circumstances are to be found in this case.

CHAMBRE J. Whether we argue this case upon the rule in *Rose v. Bartlett*, or upon the intention of the testator, we must come to the same conclusion. The rule laid down in *Rose v. Bartlett* is now so fully established that all the courts of justice are bound to conform to it: it has been considered as in force from the time of Charles the First to the present period, and has been recognized by the highest authority. With respect to the intent of the testator, this case abounds with pregnant circumstances to shew that he did not mean to include the leaseholds in the general devise.

The following certificate was sent to the Lord Chancellor:

We have heard this case argued by counsel, and attending to the whole of the will of the testator *Beilby Thompson*, We are of opinion that the leasehold houses and premises in *Middlesex* and *Surrey* did not pass by the general devise stated in this question.

ELDON.

J. HEATH.

G. ROOKE.

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Taking out a summons for further time to plead, is no waiver of the Defendant's right to move to change the venue.

THE Defendant in this case took out a summons for a month's time to plead on the 14th of *November*, and served it on the Plaintiff's attorney; on the next day it was returned indorsed with the Plaintiff's consent for a week's further time, on the terms of the Defendant pleading *issuably*, rejoining *gratis*, and taking short notice of trial for the adjournment day at the sittings in *London* after this term. The Defendant not liking the terms offered pleaded within the time he originally had to plead in, and did not accept the consent for further time or go before a judge upon the summons. On the 15th he obtained a rule *nisi* for changing the venue; and *Leas* Serjt. in support of that rule now referred to *Tidd's Pr.* 364. *ed.* 1. 528. *ed.* 2. to shew that merely taking out a summons for further time to plead is no waiver of the Defendant's right to apply to change the venue, inasmuch as an order for time to plead is no waiver of that right, except in cases where the order being obtained on the terms of pleading *issuably* and taking short notice of trial for *London* or *Middlesex* by changing the venue a trial would be lost (*a*).

Shepherd Serjt. *contra* insisted that the party who moves to change the venue ought to apply before he does any thing to shew that he means to proceed in the county where it is laid, and that the Defendant by taking out a summons had accepted the venue as laid.

CHAMBRE J. observed that this kind of case had often occurred within his recollection in practice, and that parties were never held to wave their right to change the venue unless where they expressly accepted the terms offered. He added, that the point had lately been so decided in the Court of Exchequer.

The rest of the Court were of the same opinion.

Rule absolute.

(a) In support of this position see *Shipley v. Cooper*. 7 T.R. 698. and the cases there cited in the note.

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ASSUMPSIT. The first count of the declaration stated "that on 2^d of Dec. at 2^d in consideration that the Plaintiff at the special instance and request of the Defendants had received and taken on board a certain ship or vessel of him the Plaintiff divers goods wares and merchandise to wit a two-wheeled carriage and harness to be carried on board the said ship or vessel from the port of London to parts beyond the seas to wit to Surinam they the Defendants undertook and then and there faithfully promised the Plaintiff to pay him the money due to him for freight and carriage of the same on the delivery of the bill of lading thereof to them; that the bill of lading thereof was afterwards to wit on the same day and year aforesaid delivered to them to wit at 2^d and by reason thereof the Defendants then and there became liable to pay to the Plaintiff a large sum of money to wit the sum of 20*l.* for the said freight and carriage of the said goods wares and merchandise whereof they the Defendants had notice." There were other counts in *indebitatus assumpsit*.

The Defendants demurred specially to the first count, and assigned for causes "that the Plaintiff had not in and by his said first count averred nor doth it thereby appear that any sum of money was at any time due to the plaintiff for freight or carriage of the said goods wares or merchandise in that count mentioned, and that it does not appear in or by the said first count of the said declaration that the said Plaintiff ever carried the said goods wares and merchandise from the port of London aforesaid, and that the said first count of the declaration aforesaid is in various other respects insufficient uncertain inconclusive and informal." There was also a general demurrer to the other counts.

Bayley Serjt. in support of the demurrer. The promise on the face of this first count is to pay on the delivery of the bill of lading the money due for freight and carriage; unless therefore something was due for freight and carriage at the time of the delivery of the bill of lading the Defendants have made no promise to pay any thing. Now according to the general rule of law nothing is due for freight until the ship has arrived, and it does not appear from this first count that the ship had ever quitted the port of lading. If there was any stipulation taking this case out of the

Declaration "that in consideration that the Plaintiff had taken Defendants' goods on board his ship to be carried to A., the Defendants promised "to pay the money due for freight and carriage of the same on the delivery of the bill of lading;" that the bill of lading was delivered, by reason whereof the Defendant became liable to pay a large sum, to wit, 20*l.* for freight and carriage of the said goods". Held bad on demurrer, because it did not appear that any thing became due for freight on the delivery of the bill of lading. Qu. Whether in alleging the promise to pay, the Plaintiffs should not have stated a specific sum, or said so much as should be reasonably due?

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general rule it should have been specially stated. It is impossible for the Plaintiff to contend that the concluding words "and by reason thereof the Defendants became liable to pay a large sum of money to wit 20*l.* for the said freight and carriage" &c. can amount to an averment of any such stipulation, for these words only state a conclusion of law, and unless that conclusion be warranted by the premises it must fall to the ground. Thus in *Rushton v. Aspinall*, Doug. 679 where no demand on the acceptor was alleged in an action against the indorser of a bill of exchange, Lord Mansfield said, "the promise alleged to have been made by the Defendant is an inference of law and the declaration does not contain premises from which such an inference can be drawn." With respect to the demurrer to the other counts it cannot be supported.

Shepherd Serjt. contra. I admit that the concluding averment will not cure the defect in the declaration if there be any. But although freight is not in general payable until the arrival of the goods, yet by special contract it may be made payable at any other period. In point of fact it is always customary in the carriage of goods to *India* to contract for payment of the freight previous to the sailing of the ship. Here the Defendants have promised to pay the money due for freight at the time of the delivery of the bill of lading, and it is matter of evidence whether any thing were due for freight at that time or not. If the Plaintiff prove at the trial that the Defendants contracted to pay the freight on the delivery of the bill of lading, that will sufficiently establish that the freight was then due.

Lord ELDON Ch. J. It is very clear what the parties meant to state on this record. The Plaintiff was to convey a carriage of the Defendants to *Surinam*; at which place, according to the general rule of law, the freight would become due. But as it might happen that the Plaintiff might find no one at *Surinam* to pay the freight, he contracts to have it paid *ab ante*. What difficulty there could have been in stating this contract upon the record I cannot conceive; but the strong inclination of my opinion is, that it is not stated upon the first count of this declaration. If the Plaintiff meant to say that the Defendants undertook to pay for freight and carriage of the goods on the delivery of the bill of lading, though no money should be then due for freight, he ought not to have laid the promise to pay the money due for freight; if on the other hand he meant to say that the Defendants undertook to pay such

sum of money as should be due for freight and carriage on the delivery of the bill of lading, another objection occurs, namely, that he has not averred that any thing was due for freight and carriage on the delivery of the bill of lading. Nothing could be due on the delivery of the bill of lading but by special contract, for *prima facie* the freight is not due until the arrival of the goods (a). Though it be true that the Plaintiff is not bound to state all his evidence on the face of his declaration, yet he cannot be permitted to explain one contract by another: having declared on a promise to pay the money due for freight on the delivery of the bill of lading, he cannot give in evidence another promise to pay the freight when the bill of lading should be delivered.

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HEATH and ROOKE Js. expressed themselves of the same opinion.

CHAMBRE, J. There could have been no difficulty in adapting the declaration to the Plaintiff's case. By the general rule of law both freight and mariners' wages are lost unless the goods are carried to the port of delivery. But where a party demands freight under any other circumstances he must declare specially. He must so state his facts that the Court may see on the record that he is clearly entitled. The receiving goods on board to be carried to a foreign port is a "good" consideration to found a promise to pay the freight immediately. But in this case the Plaintiff states a promise by the Defendant to pay the money due for freight on the delivery of the bill of lading. Two circumstances therefore must concur. First, there must be something due for freight; secondly, there must be a delivery of the bill of lading; but with respect to the former of these the Plaintiff has not stated any special manner in which any thing has become due for freight. I am therefore clearly of opinion that the first count of this declaration is bad. Perhaps the count is informal in other respects; though it is not necessary to pursue the objections. In stating a promise to pay the money due for freight, the Plaintiff has not specified any particular sum, or averred that the Defendants promised to pay what was reasonably due; but has merely inserted the sum in his statement of the general inference of law at the conclusion of his declaration.

Judgment for the Defendants on the first count,
and for the Plaintiff on the other counts (b).

(a) Even an inchoate right to freight does not attach, until the ship has broken ground. *Curling v. Long, ante, vol. 1. p. 634.*

(b) In *Chase and Another v. Lowering*, 81y. 220. the Plaintiffs declared "upon a promise made by Defendant to the Plaintiffs,

to pay unto them 84 l. out of the freight of a ship." On *non assumpsit* and verdict for the Plaintiffs, the Defendant moved in arrest of judgment, for that it did not appear that any freight was due out of which the money was to be paid: and the objection was held good.

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Nov. 24th.

DOE ex dem. BARNFIELD and Others v. WETTON.

Devise "to S. S. her heirs and assigns forever; but if she shall happen to die leaving no child or children lawful issue of her body living at the time of her death then to F. B. and his heirs." Held that the devise in fee to S. S. was not restrained by the subsequent words to an estate tail: and that the devise over to F. B. was a good executory devise.

AT the trial of this action before Lord *Eldon* Ch. J. at the Sittings after last *Trinity* term, a verdict was found for the Plaintiff, subject to the opinion of the Court, upon a case which stated in substance as follows:

G. Taylor being seised in fee of the premises in question, which were copyhold, and having previously surrendered the same to the uses of his will, on the 18th of *May* 1761 devised as follows: "I give devise and bequeath unto my wife *Phebe Taylor* all my freehold copyhold and leasehold messuages tenements hereditaments and premises with their appurtenances wheresoever situate for and during her natural life"; after several bequests of personal property, and charging the said premises with an annuity secured by bond he proceeded as follows: "And from and after the decease of my said wife I give devise and bequeath all my said freehold premises together with my said leasehold premises (charged and chargeable nevertheless as aforesaid) unto my friend *Francis Barnfield* his heirs executors and administrators, upon trust nevertheless from and after payment and satisfaction of the said bond debt to permit and suffer my said son *John Taylor* to have receive and take the rents issues and profits thereof to and for his own use and benefit for and during his natural life, and from and immediately after his decease then upon trust to and for all and every the sons and daughters of the body of my said son *John Taylor* lawfully issuing and their heirs and from and after the decease of my said wife as aforesaid I give devise and bequeath all my said copyhold messuages and premises (charged and chargeable nevertheless as aforesaid) unto my Daughter *Susannah Saunders* her heirs and assigns for ever but if my said daughter shall happen to die leaving no child or children lawful issue of her body living at the time of her death then I give devise and bequeath all the said copyhold premises chargeable as aforesaid unto the said *Francis Barnfield* and his heirs upon trust nevertheless by and out of the rents and profits thereof to keep the said premises in good and substantial repair as occasion shall be or require and to pay or permit and suffer my said son *John Taylor* to have receive and take the rest and residue of the rents issues and profits of the said copyhold premises to and for his own use and benefit for and during his natural life, and from and after his decease then upon trust

trust to and for all and every the sons and daughters of the body of my said son lawfully issuing and their heirs and for want of such issue then upon trust for my right heirs for ever." The testator *George Taylor* afterwards died seised of the premises, without altering his will, and upon the 21st *May* 1770 his daughter *Susannah Saunders* was admitted to the premises to hold to her and the issue of her body lawfully begotten in reversion expectant upon the death of the said *Phebe Taylor*, and at the same court at which the said *Susannah Saunders* was so admitted in reversion, the said *Phebe Taylor* and *Susannah Saunders* together with her husband *Constable Saunders* duly suffered a recovery according to the custom of the said manor, to the use of the said *Phebe Taylor* for life, with remainder in fee to the said *Susannah Saunders*; who were severally admitted accordingly. The said *Phebe Taylor* died in *March* 1786 in the lifetime of *Susannah Saunders* who survived her husband the said *Constable Saunders* and afterwards intermarried with the Defendant *Humphrey Wetton*. The said *Susannah Wetton* (formerly *Saunders*) died about 11th *December* 1799. leaving no lawful issue of her body then living, having first surrendered the premises to the uses of her will, and having also afterwards made her will or testamentary writing of appointment and thereby given the premises to her husband the Defendant and *Henry Taylor* in trust as mentioned in her will; and the Defendant and the said *Henry Taylor* were afterwards admitted to the same accordingly. *Francis Barnfield* the devisee in trust in the will of the said *George Taylor* died on the 18th *April* 1763, leaving the lessors of the Plaintiff his only sons and heirs at law according to the custom of the manor him surviving, who were thereupon admitted to the premises in question in fee at the will of the lord. The question for the opinion of the Court was, Whether the Plaintiff under the circumstances stated was entitled to recover?

Best Serjt. for the Plaintiffs. The question is, Whether the devise over to *Francis Barnfield* be a good executory devise? and this will depend upon another question, Whether the previous devise to *Susannah* be an estate in fee? for if that be an estate in fee, the devise over is an executory devise or nothing. The limitation "to *Susannah Saunders*, her heirs and assigns for ever," *prima facie* imports a fee, and if it had been intended by the testator that the words immediately following should restrain that estate to an estate tail, he would not have confined the failure of issue to the time of her death. In *Pells v. Brown*, *Cro. Jac.* 590.

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the devise was to *Thomas* and his heirs *in perpetuum*, and if *Thomas* died without issue living *William* his brother, that then *William* should have the lands to him his heirs and assigns for ever; and it was resolved that *Thomas* took an estate in fee and not in tail; for the limitation respecting issue was not absolute and indefinite whenever he died without issue, but with a contingency, if he died without issue living *William*. So in 1 *Roll. Abr.* 835. *pl.* 4. where there was a devise of lands to *B.* in fee, and of other lands to *C.* in fee, subject to a proviso that if either died before they were married or before twenty-one and without issue, then the estate of him so dying should go to the survivor, it was held that each took an estate in fee, with an executory devise over to the survivor for life. To the same effect is *Gulliver v. Wicket*, 1 *Wilson*, 105; and the cases of *Porter v. Bradley*, 3 *T. Rep.* 143. and *Roe d. Shears v. Jeffery*, 7 *T. Rep.* 589. are in point. Besides, the word "assigns" would never have been inserted in the former part of this devise, if the testator had intended that the word "heirs" should denote special heirs; an estate-tail not being in its nature assignable.

Clayton Serjt. contra. Though the first words of this limitation import a fee, they are so controuled by those which follow that *S. Saunders* could only take an estate tail. It appears to have been the general intent of the testator to provide for his two children and their issue. Having limited an estate to the son and his children, he proceeds to give the estate in question to his daughter and her children. Now if the devise be construed strictly, the consequence must be, that if all the children of *S. Saunders* should die before her, the estate would go over, though such children may have left children living at the death of *S. Saunders*. In order therefore to effectuate the intent of the testator, the Court must hold that the estate would descend to such grandchildren; and this cannot be done without giving *S. Saunders* an estate-tail. This circumstance distinguishes the case from *Porter v. Bradley* and *Doe v. Jeffery*, in which the intent of the testator seems to have been in favour of a fee. In *Clatch's* case, *Dyer*, 350. b. 1 *Roll. Abr.* 839. *pl.* 3. S. C. "one devised a messuage to *Alice* his daughter and her heirs, and another messuage to *Thomasin* his daughter; then eight years old, and her heirs, and if she died before she attained the age of sixteen years living *Alice*, then he willed that *Alice* should have *Thomasin's* share to her and her heirs; and if *Alice* died having no issue living

Thomafin, that *Thomafin* should have and enjoy *Alice*'s share to her and her heirs; and if both daughters should die having no issue, devise over to *J. S.* and his heirs: and it was held (a) that the daughter took an estate-tail, and not a fee on a contingent sublequent." This case comes very near the present, and though *Pemberton* Ch. J. in *Holmes v. Meynell*, Sir *T. Jones*, 173. observes that "he had heard great opinions that it was not law," yet it has never been expressly denied. A very strong authority for the construction for which I am contending is *Morgan v. Griffith*, Cowp. 234. where the testator having devised to *T. G.* for and during his natural life and after his decease to his right and lawful heirs and assigns for ever, and for want of such lawful heirs to *T. E.* his heirs and assigns for ever, *T. G.* was held to take only an estate-tail. It has been a general rule ever since the case of *Luddington v. Kime*, 1 Salk. 224. 1 *Ld. Ray.* 203. S. C. that the Court will not construe a limitation to be an executory devise, if they can construe it to be a contingent remainder.

LORD ELDON Ch. J. This case has on the part of the Defendant been put upon the only ground on which it was capable of being put, viz. that it was the manifest intention of the testator, that the property in question should go to the issue of *S. Saunders*. Some principles may be taken as quite clear. If this be a good executory devise a recovery will not bar it, and it is equally true that the courts always endeavour to construe a limitation a contingent remainder rather than an executory devise. The policy of the latter rule is founded on the very circumstance that an executory devise cannot be barred. After giving the estate to *S. Saunders* her heirs and assigns for ever, the testator proceeds to limit it over to *J. Taylor* in the following terms: "But if my said daughter shall happen to die leaving no child or children lawful issue of her body living at the time of her death then &c." Now *J. Taylor* to whom the estate is here given certainly was a relation of *S. Saunders*, and if the devise had been "if my daughter shall die without heirs", as *J. Taylor* was the next heir to *S. Saunders* after her own children, it would have shewn that the testator by the word "heirs" meant heirs of the body, because *J. Saunders* could not die without heirs so long as *J. Taylor* existed. On similar grounds *Clatch*'s case may have been decided. It was impossible that the second limitation to *Thomafin* should ever take place if *Alice* took an estate

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in fee by the first limitation. For the estate being limited to *Alice* and her heirs, if *Alice* died without children living *Thomasin*, *Thomasin* the sister would take as heir general of *Alice*: when therefore the testator says, "if *Alice* die without issue living *Thomasin*", the latter words circumscribe the former, and shew that by the word "heirs" must be intended "issue". It is probable however that this case was determined upon the last limitation, "if both daughters shall die having no issue devise over to J. S." It has been argued in this case, that it was manifestly the testator's intention, that the children and grand-children of *S. Saunders* should be benefited. But however that may be, the question is, Whether the testator intended that the children and grand-children should be benefited by this will or by some disposition to be made by *S. Saunders*? If she had any children living at the time of her death, the estate being given to her in fee, she would have abundant power to provide both for children and grand-children. Nothing however is given to them by this will; they are merely named in the description of the contingency on which the estate is to go over. It only remains to be considered, whether this limitation be within the time allowed to executory devises; and that it is, there can be no doubt. With every inclination to make this a contingent remainder, yet unless we can construe the devise to be to *Phebe Taylor* for life, and in case *S. Saunders* shall leave children living at her death, then to *S. Saunders* in fee, but if not, then to her for life, remainder over in fee, we must hold it to be an executory devise. But by the mode of construction to which I have alluded *S. Saunders* would not know at the time when her interest commenced, whether she was to have a life-estate or a fee. We are bound to hold that the whole fee being given to *S. Saunders* her heirs and assigns in remainder, no further remainder over can be limited upon that fee, and that the estate given to the lessor of the Plaintiff is a new fee limited upon a contingency.

HEATH J. I think this case clearly falls within the principles laid down in *Pells v. Brown*, and has not been taken out of those principles by the arguments which have been employed. A fee having been given to *S. Saunders*, the rule that a limitation shall be construed a contingent remainder rather than an executory devise cannot apply to the limitation over in this case.

ROOKE J. I am of the same opinion.

CHAMBRE J. I am of the same opinion.

Judgment for the Plaintiff.

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MILLER v. COUSINS.

Nov. 25th.

THE Plaintiff in this case having signed judgment for want of a plea, the Defendant sued out a writ of error thereon; and the Plaintiff brought an action on the judgment. The Defendant then applied to the Court and obtained a rule *Nisi* to stay the Plaintiff's proceedings in the second action, pending the writ of error, he giving judgment in that action, with stay of execution, and undertaking not to bring a writ of error thereon.

If Defendant's attorney admit in effect, tho' not in terms, that a writ of error sued out by him has been brought for delay, the plaintiff is at liberty to proceed on the judgment.

Bayley, Serjt. in answer to the application, produced an affidavit to shew that the writ of error was merely for delay, which stated that the Defendant's attorney had applied to the Plaintiff's attorney for six months time to pay the money due, and for which the action on the judgment was brought, alleging "that unless that request was granted the Defendant must put himself to great expence to obtain that time and in the end must go to gaol and thus the Plaintiff would lose his money" but never intimated that there was any error in the judgment. He cited *Law v. Smith*, 4 T. R. 436. n. (a), where on account of a similar declaration of the Defendant's attorney the Court of *King's Bench* refused to stay proceedings on the Plaintiff's judgment, pending a writ of error brought by the Defendant.

Shepherd, Serjt. *contra*, insisted, that it was not a necessary inference from this declaration of the Defendant's attorney, that the writ of error was brought for delay, and that the Court had always held a writ of error a stay of proceedings, except in cases where there has been an unequivocal declaration of its being merely for delay.

But *the Court* held the rule to be, that where the Defendant's attorney has in effect, though not in terms, admitted the writ of error to be brought for delay, there the Plaintiff is notwithstanding at liberty to proceed on the judgment (a).

Rule discharged.

(a) *Entwistle v. Shepherd*, 2 T. R. 78. and *1 Sellen's Pract.* 544. ed. 2. where the authorities on this point are collected.

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Nov. 25th.

PENSON v. LEE.

In an action on a policy of insurance, with a count for money had and received, if the Defendant pay no money into court, but establish as a defence that the risk never commenced, the Plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. In such case neither party is entitled to the costs of the 1st count, but the Plaintiff is entitled to the costs of the count on which he succeeds and so much of the expenses of the trial as were necessarily incurred by him in support of that count.

ASSUMPSIT on a policy of insurance, with a count for money had and received. The Defendant paid no money into court.

At the trial before Lord *Eldon*, Ch. J. at the Guildhall sittings after last *Easter* term, the case was opened for the Plaintiff merely on his right to recover upon the policy. The defence set up was, that the ship was not sea-worthy: and upon this point, without any direct evidence of fraud, the case went to the jury. While they were deliberating upon their verdict, the counsel for the Plaintiff observed to his Lordship, that in case the jury should be of opinion that the ship was not sea-worthy, the Plaintiff would be entitled to a verdict for a return of premium. The jury having no intimation of this claim brought in their verdict generally for the Defendant.

A rule *Nisi* having been obtained upon a former day, to enter a verdict for the premium upon the count for money had and received,

Cockell and *Vaughan*, Serjts. shewed cause, and admitted that upon inquiry the practice had been found to vary, with respect to allowing the Plaintiff to take a verdict for the premium in cases of this kind, contending that as no mention had been made by the Plaintiff in the opening of his case respecting the return of premium, under the apprehension that such a claim might prejudice the jury against him on the principal point, he ought not now to be permitted to set it up; that the Defendant had been deprived of the opportunity of contesting the claim by cross-examining the Plaintiff's witnesses, or producing evidence on his own part to establish fraud, and that therefore if the Plaintiff were now permitted to insist upon it, he would take advantage of his own wrong. They cited the case of *Nesbitt v. Whitmore*, B. R. E. 40 Geo. 3. (a) where a case having been reserved for the opinion of the Court, in which no mention was made respecting a return of premium, the Court being of opinion with the defendant upon the principal point, did not think proper to direct a verdict to be entered for the Plaintiff for the premium, though to prevent another action being brought they subjected the Defendant to the terms of paying the premium to the Plaintiff on having judgment entered for himself without

(a) See this case mentioned with some slight difference, 1 *East*. p. 97. in *notis*.

costs. They also referred to *Mackenzie v. Duff, Park. Insur.* 377.

Shepherd, Lens, and Bayley, Serjts. in support of the rule observed, that had they not considered it as the constant practice for the Plaintiff in such cases to have a verdict on the count for money had and received, they should have made the claim at an earlier period of the cause; that whenever the defence set up imports that the risk never has commenced, it is a consequence of law that the plaintiff is entitled to a verdict for the return of premium; that if the facts of this case had been stated on a special verdict, the Court would have been bound to enter judgment for the Plaintiff. They cited *Burman v. Woodbridge, Dougl.* 781. and *Rotbwell v. Cooke, ante*, vol. 1. p. 172. and *Hogg v. Horner, Park. Insur.* 377. *ed. 4.* to shew that the Plaintiff is entitled to a verdict, though the right to a return of premium were never mentioned during the progress of the cause; and relied on *Nesbitt v. Whitmore*, where, although judgment was entered for the Defendant, he had been compelled him to pay the premium to the Plaintiff.

Lord ELDON Ch. J. I will state the present inclination of my opinion upon this subject: but before the case is ultimately decided I should wish to have some conversation with Lord *Kenyon*, and learn whether any or what practice has hitherto prevailed. If any practice has prevailed, it will be unnecessary to enter into the theory of the subject. The Plaintiff's language upon the record is this; I am entitled to recover as for a total loss, and if I fail in that I am entitled to recover so much money as the Defendant withholds from me contrary to good faith. The language of the Defendant is, that he owes nothing upon either demand. If the nature of the defence be such that the Plaintiff must necessarily recover back the premium if he fail in his demand upon the underwriters as for a total loss, his counsel need not state a single word to the jury respecting the return of premium. But if the failure on the greater demand does not necessarily infer a right to recover upon the lesser demand, the question will be, Whether if the Plaintiff's counsel confine himself to the former, the Defendant's counsel will not have a right to conclude that the latter has been abandoned. The Plaintiff has his choice; he has stated two demands upon the record, and he may insist upon both, or upon one only; if he be apprehensive that setting up a claim for the return of premium will prejudice the jury against him as to his claim for the total loss, and therefore suffers the cause to proceed to its conclusion without

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without saying one word about the premium, how is the Defendant's counsel to act? If there be any settled practice upon the subject, they may conduct themselves accordingly; but supposing no settled practice to exist, they will have lost the opportunity of cross-examining the Plaintiff's witnesses, as well as of producing evidence on their own part, to rebut the demand for a return of premium. Does the defence established in this case necessarily infer a right to a return of premium? certainly not, if gross fraud would have been an answer (a). *Primâ facie* the Plaintiff's counsel had nothing to do but to make the demand; but if gross fraud had been shewn, it will not be admitted that they could have succeeded upon that demand: and the question is, Whether it was necessary for the Defendant to combat a claim which had never been made? If it was my duty to have stated to the jury, that if they found the ship not sea-worthy they must give the Plaintiff a verdict for the premium, on the count for money had and received, I do not think that the mere circumstance of this verdict being found generally for the Defendant ought to conclude the Plaintiff. But if gross fraud be a material ingredient in summing up where a return of premium is demanded, though I will not take upon me to say that actual fraud was proved in this case, yet I shall not have done my duty in not stating to the jury that there were circumstances very material for their consideration, and that if they amounted on their judgment to gross fraud, that would overthrow the claim for a return of premium. Suppose the Defendant's counsel, upon the demand being set up at the conclusion of the trial, had then desired leave to go into evidence of fraud; could it have been refused? The inconvenience will be extreme if the Plaintiff's counsel can be permitted to open as many cases as they please *gradatim et seriatim*. I do not conceive that this case can be decided merely with reference to actions on policies of insurance; it must be decided with reference to all other cases in which several demands can be made under the different counts in the declaration. If the practice is already settled it must prevail; but if it be yet unsettled, I think the Plaintiff ought to be bound by his opening.

HEATH J. If the practice upon this subject be settled, I see no reason why the Defendant should complain of surprize, for the common and ordinary practice is sufficient notice to him.

(a) See this point discussed, *Park. Insur.* { and others v. *Frazer*, B. R. *Trips.* 33 *Geo.* 3.
215—218. and finally settled in *Chapman* *Park. Insur.* 218.

ROOKE, J. I shall yield to the practice whatever it may turn out to be. But on principle, it appears to me, that it would be attended with great inconvenience, if the Plaintiff were suffered to take a verdict in cases of this kind. I think that the Plaintiff ought to make a full disclosure of his case to the jury: the jury only have power to give a verdict for the return of premium; the Court cannot order it. Suppose the Plaintiff were to admit that the ship was not sea-worthy, the Court could not refer the case to the prothonotary to ascertain the premium. The Defendant may go into evidence of fraud; and if the demand be capable of being rebutted it should have been stated to the jury.

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CHAMBRE J. In practice great indulgence is allowed to the counsel in cases of this sort. Some inconvenience may perhaps arise from not stating the whole case to the jury in the opening; but justice is often better obtained by not holding the counsel too strictly to the statement in the opening. On the part of the Plaintiff all that was necessary was proved; and if the Defendant intended to prevent the Plaintiff from recovering the premium he should have proved fraud. The Court indeed ought not to suffer the Defendant to be surprized, or to preclude him from entering into evidence if he has it in his power. In general every thing is taken to be proved which is not objected to. In drawing up a demurrer to evidence, many facts are stated which never were actually given in evidence. If it were not so, the business of the sittings would be protracted to an intolerable length. The determination of this case must depend entirely on the practice.

LORD ELDON Ch. J. On this day said—We have made inquiries respecting the practice on this subject, and find that Lord Kenyon is of opinion that in cases of this kind, the Plaintiff is intitled to a verdict for the premium. Without entering into any reasoning upon the subject, we have only to say, that the verdict in this case must be entered for the Plaintiff on the count for money had and received, but as there may be cases in which the application of this practice may work injustice, we hope that the Plaintiff's counsel will in future demand the premium in his opening where he means to insist upon it on failure of his claim for the loss.

Per Curiam,

Rule absolute.

Afterwards on the taxation of costs the prothonotary allowed to the plaintiff the costs of the count for money had and received on

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which he had succeeded, in doing which he included all the expences attending the trial, but allowed no costs to either party on the counts upon which the Plaintiff had failed. In consequence of this a rule *nisi* was obtained calling on the Plaintiff to shew cause why the prothonotary should not review his taxation and allow costs to the Defendant on all the counts except that for money had and received.

Shepherd, Leng, and Bayley Serjts. now shewed cause, and argued, 1st, that the Plaintiff was entitled to all the costs of the trial since he could not have recovered upon the count for money had and received without going into all the circumstances of the case, and that it was no hardship upon the Defendant, inasmuch as he might have saved that expence and trouble by paying the premium into Court; 2dly, that according to the case of *Spicer v. Teasdale*, ante, p. 49. where the Plaintiff in this Court recovers upon one count he is entitled to the costs of all the counts; but even supposing that practice to have been since altered and the rule of the King's Bench to have been adopted (a), yet the Defendant could not be entitled to any costs in a case where the Plaintiff has succeeded upon one count on the trial of the general issue; though where different issues were tried it might be otherwise.

Cockell and Vaughan Serjts. in support of the rule contended, 1st, that the Plaintiff's success upon the last count did not arise out of the evidence adduced by the witnesses on the part of the Plaintiff, but out of the total failure of the Plaintiff on that part of the case which it was brought to support and out of the case established by the Defendant; 2dly, that where the Court see two separate causes of action on record, if the Plaintiff succeed on one and the Defendant on the other, they will allow costs to each party, and that no two causes of action could be more distinct than those upon which issue was taken in this case. They referred to *Day v. Hanks*, 3 T. R. 654. *Braithwaite v. Bradford*, 6 T. R. 599. and to the case in this court T. 32 G. 3. cited by *Le Blanc* J. 8 T. R. 467.

Lord ELDON Ch. J. Subsequent to the case of *Spicer v. Teasdale* the Court declared, though whether in such a manner as to be heard by all the bar I will not take upon me to say, that the practice of this Court should in future be conformable to that of the King's Bench. On this record there are manifestly distinct

(a) Which the Court intimated to have been the case, when the rule *nisi* was obtained.

causes of action; and if consistently with the practice of the *King's Bench*, the Court could order the prothonotary to allow costs to the Plaintiff upon that count only on which he has succeeded, and to the Defendant upon the others, I think that we should promote the justice of the case; but as it appears that the Defendant in a case like this would not be allowed his costs in the *King's Bench*, I am to presume that the practice of that Court is founded on equity and reason. In the present instance, however, as the prothonotary has taxed the costs under the supposition that he was bound to allow all the costs of the trial to the Plaintiff, the taxation must be reviewed. In making his review he will consider whether the witnesses adduced by the Plaintiff were *bonâ fide* brought forward to support the count upon which the Plaintiff has recovered either wholly or in part, and will allow for them accordingly; if he shall be of opinion that they were not brought forward with the intention of supporting that count, either wholly or in part, he will disallow the costs respecting them altogether.

HEATH J. observed, that in the case of *Day v. Hanks*, the judgment entered for the Plaintiff had been suffered by the Defendant to go by default (a); and that the Plaintiff who carried down the record to trial failed there altogether.

ROOKE J. concurred.

CHAMBRE J. The case of *Day v. Hanks* does not apply to this. For in that case the Plaintiff had judgment upon an inquest of office only, whereas the Defendant had judgment upon the only issue that went down to trial. It seems to me to be the settled practice of the *King's Bench*, that if a trial takes place, and any one issue be found for the Plaintiff, he must have the general costs; though on the taxation of those costs, the officers are authorized to deduct the costs of all such parts of the pleadings, of such parts of the briefs, and of such witnesses as are not applicable to the points on which the verdict proceeds.

The prothonotary was ordered to review his taxation on the above principles (b).

(a) In *Braithwaite v. Bradford*, 6 T. R. 602. however, *Grose J.* thought that "if that case were considered as so many rights claimed in different counts, and separate issues taken on each, it would fall within the reason of the determination in *Day v. Hanks*."

(b) The case most analogous to the pre-

sent, is *Butcher v. Green*, Doug. 678. cited *ant.* p. 50. note (b). In that note an observation is made on *Butcher v. Green*, which observation as well as the general inference there drawn from *Day v. Hanks*, must, after the present decision, be abandoned.

Nov. 25.

BROOKER v. SIMPSON.

A joinder in demurrer must be signed by a Serjeant.

THE Defendant, a prisoner, having demurred and given a rule to join in demurrer, the Plaintiff filed a joinder in demurrer in the office which was not signed by a Serjeant; whereupon the Defendant signed judgment of *nonpros*; and then obtained a rule to shew cause why he should not be discharged out of custody.

Bayley Serjt. on shewing cause cited *Hubert v. Lord Weymouth*, 2 Bl. 816. where the Court held that the replication of *nul tiel record* does not require a Serjeant's hand, and overruled the case of *Simson v. Neale*, 2 Wils. 74. in which the contrary had been decided; he also referred to *Ellis v. Govey*, ante, vol. 1. p. 469. where the Court said that a *similiter* was an exception to the rule, "that where the plea is signed by counsel the replication must be signed also," and urged that a joinder in demurrer was a mere *similiter*.

Marshall Serjt. *contra*, cited *Douglas v. Child*, E. 33 Geo. 3. (a) C. B.

The Court (after conferring with the officers) said, that a joinder in demurrer ought to have a Serjeant's hand; for that a Serjeant ought to be met by a Serjeant.

Rule absolute.

(a) *Douglas v. Child*, E. 33 Geo. 3. C. B. The Defendant delivered a demurrer without being signed by a Serjeant; whereupon the Plaintiff signed judgment.

The Court, after hearing Bond and Run-nington Serjts. and having considered the point, declared that it would be extremely improper to allow an attorney to sanction so important a step in the cause, as that

which admits all the facts to be well pleaded on the other side. And Eyre Ch. J. said, that it would be great presumption in an attorney to take upon himself to decide when a party might demur or join in demurrer; and that this could in no case be such a matter of course that the attorney might do it himself.

Nov. 25.

ATKINSON v. NEWTON.

Fi. fa. being made returnable on a King's Bench return day, instead of a Common Pleas return day, was amended by the award of execution on the roll.

THE writ of *fieri facias* in this case having been made returnable "on the Thursday after the morrow of All Souls," which is the return day in the King's Bench, instead of "on the morrow of All Souls," the return day in this Court, cross motions

were made; *viz.* on the part of the Plaintiff to amend, and on the part of the Defendant to set aside the proceedings on the execution for irregularity. Both these applications now coming on to be considered,

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Shepherd Serjt. in support of the former motion cited *Browne v. Hammond, Barnes*, 10. *Newnham v. Law*, 5 *T. R.* 577. *Shaw v. Maxwell*, 6 *T. R.* 450. *Bourchier v. Little*, 1 *H. Bl.* 291. *Carr v. Shaw*, 7 *T. R.* 299. and *Stevenson v. Danvers*, *ante*, p. 100.

Best and *Onslow* Serjts. *contra*, insisted that the Court would not give leave to amend unless with a view to further the justice of the case, which in this instance would be defeated by the amendment proposed. They also contended that there was nothing to amend by, and cited *La Roche v. Wasbrough*, 2 *T. R.* 737. where the Court in granting leave to amend laid stress on the circumstance of their being something by which the mistake might be amended.

But the other side observing, that on a reference to the record as now made up, it would appear by the award of execution that the writ was awarded "returnable here on the morrow of *All Souls, &c.*" and this being proved by production of the record;

The Court made the rule for amending absolute, and discharged the rule for setting aside the proceedings.

MOUNTFORD *v.* WILLES.

Nov. 27th.

ACTION for goods bargained and sold. In support of the Plaintiff's demand, a note of the Defendant's was given in evidence at the trial, requesting the Plaintiff to furnish one *W. Julien* with timber to the value of 30*l.* or thereabouts, for which the Plaintiff undertook to be answerable. At the bottom of the note was written, "Credit till *Christmas*." A verdict was found for the Plaintiff which included interest on the sum demanded from the *Christmas* referred to in the note.

In a contract for the sale of goods, if any particular time be limited for payment of the price, the vendor is entitled to interest on the price from that time

Marshall Serjt. having obtained a rule *nisi* to set aside the verdict and have a new trial on some other points which were overruled, now objected that the Plaintiff could not retain the verdict as it included interest, which ought not to be given for goods sold. He cited *Blaney v. Hendrick*, 3 *Will.* 205. where

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though it was ruled that interest might be given on an account stated from the day on which it was stated, yet *Gould, Blackstone, and Nares Js. (absente De Grey Ch. J.)* said, that "for money owing for goods sold and delivered no interest shall be allowed."

But *the Court* held that the Plaintiff was entitled to interest from the period mentioned in the note.

Rule discharged.

Nov. 27th.

ELLIOT and Others v. DAVIS.

A. executed a bond as the joint and several bond of himself and B. and signed it "A. and B." having no authority from B. so to do. Held that the bond was good as the several bond of A.

DEBT on bond. Plea *non est factum*.

At the trial before Lord *Eldon* Ch. J. it appeared that the bond in question was given to the Plaintiffs by the Defendant as surety for a third person; that previous to its execution, the Defendant having brought the bond to the Plaintiff's counting-house filled up with his own name only as a surety, it was objected on the part of the Plaintiffs that they meant to have the joint security of the Defendant and his partner, one *Marsh*; that upon this objection being made the bond was, with the consent of the Defendant, but in the absence of *Marsh*, altered into a joint and several bond in the names of the Defendant and *Marsh*, and being signed by the Defendant "*Davis and Marsh*" was by the former regularly sealed and delivered as his deed; and that *Marsh* on being informed of the transaction, expressed his disapprobation of what the Defendant had done. Upon this evidence it was insisted on the part of the Defendant that there was no regular single execution of the bond, there being but one seal, against which were set the names of "*Davis and Marsh*," and that the execution therefore being insufficient as against both, was insufficient also as against the Defendant. A verdict was found for the Plaintiffs, with leave to the Defendant to move to have that verdict set aside and a nonsuit entered. Accordingly a rule *nisi* having been obtained for that purpose on a former day,

Cockell Serjt. now shewed cause and contended that the bond was well executed as against the Defendant, the signing being immaterial, as appears from the form of pleading, where the sealing and delivery only are averred, both which latter acts the Defendant alone performed. He cited *Cromwell v. Grunsden*, 2 Salk. 462. 1 Lord Raymond, 335. S. C. where the Plaintiff having declared on a bond of the Defendant's testator *Robert Erlin* and it appearing

to have been signed "*Robert Erlwin*," the Court on an objection taken said "the variance between the name signed which is *Erlwin* and the name in the obligation which is *Erlin*, is not material, because subscribing is no essential part of the deed, sealing is sufficient."

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Sellon Serjt. in support of the rule insisted, that though signature might not be necessary to the validity of a bond, still if any signature be actually put to it, the parties to the bond must abide by that signature; that in this case the alteration in the bond was made at the instance of the Plaintiffs, who having at the time the Defendant entered into this engagement refused to take his single security, ought not now to be allowed to resort to him alone, since if it had been a good joint and several bond, he would have been entitled to contribution from his co-surety (a).

Lord ELDON Ch. J. The alteration which was made in the bond appears to have been as much the act of the Defendant as of the Plaintiff, so that no argument in his favour can be drawn from that circumstance. His single security being objected to, he offered to execute a bond for himself and his partner *Marsh*, having no authority from the latter to bind him. The way in which this obligation begins is this, "Know all men by these presents I *T. Davis* and *G. Marsh*" &c. The Defendant meant it to be his several bond, and the joint and several bond of himself and *Marsh*. Having had no authority to bind *Marsh*; the bond becomes the several bond of the Defendant, but not the joint and several bond of himself and *Marsh*. The bond being sealed and delivered is sufficient, and we would, if it were necessary, hold him to have described himself by the name of "*T. Davis* and *G. Marsh*," and to be estopped from shewing that his name is *T. Davis* only.

The other Judges concurring in opinion,

Rule discharged.

(a) See *Conwell v. Edwards*, ante, 268. and *Deering v. Lord Winchelsea*, ante., 270.

SMITH v. TYSON.

Nov. 27th.

THE Defendant in this case was holden to bail on an affidavit made by the Plaintiff's clerk, who swore positively to the debt, "and that no offer or tender had been made to the said Plaintiff to pay the same or any part thereof in notes of the go-

If an affidavit to hold to bail made by the Plaintiff's clerk expressly negative a ten-

der in bank notes, it is bad: for a clerk cannot have certain knowledge of a mere negative.

vernor

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CASES IN MICHAELMAS TERM

vernor and company of the Bank of *England* expressed to be payable on demand."

Onflow Serjt. having obtained a rule *nisi* for discharging the Defendant on a common appearance on the ground of the tender in bank-notes having been expressly negatived by a clerk, whereas that fact could not be sufficiently within his knowledge to warrant the affidavit;

Bayley Serjt. *contra*, insisted that the affidavit being positive was sufficient, for that if it was false the clerk was indictable for perjury, and that a positive affidavit of the debt by a clerk had been held good.

Ghambree J. observed that a clerk may have knowledge of a debt being due to his master, that being a certain fact, and if that debt has been discharged it is matter of defence; but that in this case the clerk had also sworn to a mere negative, of which he could have no certain knowledge.

The Court were of opinion that the affidavit was bad, and refused to allow a supplemental affidavit.

Rule absolute.

(a) If the clerk had negatived the tender according to the best of his knowledge and belief it would have been equally bad in this case. *Cass v. Levi*, 8 T. R. 520. Though if the Plaintiff had been abroad it should seem that such an affidavit by the clerk would

have been sufficient. See *Munro v. Spinks*, 8 T. R. 284. where the agent of a Plaintiff abroad swore positively to the debt, and negatived the tender in bank notes according to the best of his knowledge and belief.

Nov. 28th.

RUSHTON v. CHAPMAN.

The day inserted in the notice to appear to a common capias must be the return day of the writ.

THE Defendant in this case was served with a common capias, returnable in fifteen days of the *Holy Trinity*, (the 22d of June,) to which a notice was subjoined to "appear in his Majesty's Court of Common Pleas at the return thereof being the 25th Day of June," which was the *quarto die post*. A rule was obtained calling on the Plaintiff to shew cause why the proceedings should not be set aside for irregularity; and the case was mentioned several times in this term.

Best Serjt. in support of the rule relied upon the words of the 5 Geo. 2. c. 27. s. 4. and the constant practice of the Court antecedent to the case of *Sumner v. Brady* in 1791, 1 H. Bl. 630; with respect to which case he observed, that as the proceedings there appeared by the report to have been founded upon an origi-

nal *clausum fregit*, the statute did not apply, and added, that as the Defendant, after having received notice to appear at the return, could not be in contempt until the *quarto die post*, he would be deprived of the latitude which the law allows, if the Plaintiff were permitted to give notice for him to appear on that very day upon which if he does not come in he will be in contempt.

The officers reported to the Court, that upon search made it appeared that the process in *Sumner v. Brady* was a common *capias*.

Runnington Serjt. in shewing cause relied on the authority of *Sumner v. Brady*, and adopted the reasoning there made use of, that the *quarto die post* is to be considered as the effectual return day, and that the notice would be equally good whether the return day or the *quarto die post* were inserted.

Lord ELDON Ch. J. upon the argument inclined to think that it was impossible for the Court to hold that the notice would be equally good either way, for that the words of the act of parliament must be taken to mean one day or the other; and if the summons in this case was good, a notice in which the words of the act were strictly followed and the return day inserted must be bad.

On this day his Lordship said:—We understand that the practice of the Court has been to support notices similar to the present. If that had not been the practice I should have entertained doubts upon the case. My brothers however are disposed to think that in future at least that practice ought to be altered, and that those notices will be more conformable to the act of parliament if they are drawn up according to the practice which existed previous to the case of *Sumner v. Brady*. We desire therefore it may be understood that the Court now orders that in future the return day be inserted in the notice.

Per Curiam.

Rule discharged.

HOLLAND v. WHITE.

Nov. 28th.

IN this case the son of the Plaintiff's attorney was present in Court when the bail justified, but the Plaintiff's attorney, not having been served in time with a rule allowing the justification, took an assignment of the bail-bond and proceeded thereon. To set aside this assignment and the proceedings thereon a rule *nisi* was obtained;

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Against

If the rule of allowance of bail be not served on the Plaintiff's attorney, he may take an assignment of the bail bond, though he knows of the justification.

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Against which *Runnington* Serjt. now shewed cause, and cited *The King v. The Sheriff of Middlesex*, 4 T. R. 493. and *Roberts v. Gilbert*, E. 34 Geo. 3. C. B. to shew that the rule allowing the justification must be actually served although the Plaintiff's attorney be present at the justification.

Clayton Serjt. was proceeding to support the rule *niß*, and observed that no fraud had been practised on the revenue (a), inasmuch as the rule had been actually drawn up, though not served in time.

But the Court on reference to the officers finding the practice to be as stated on the part of the Plaintiff, and that it proceeded not only on the ground of protecting the revenue, but also on the notion that the Defendant must be taken to have waved his justification unless he serve the rule for the allowance,

Discharged the Rule.

(a) In *The King v. The Sheriff of Middlesex* the Court said they were bound to take care that the revenue was not defrauded.

THE END OF MICHAELMAS TERM.

C A S E S

1801.

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Hilary Term,

In the Forty-first Year of the Reign of GEORGE III.

HILL, one, &c. v. HUMPHREYS.

Jan. 27th.

THE Plaintiff in this case having brought an action to recover the amount of a bill for business done by him as attorney to the Defendant, the cause came on to be tried before Lord Eldon Ch. J. at the *Westminster* Sittings after last *Michaelmas* Term. On the part of the Plaintiff it was proved, that a month before the commencement of the action, a copy of the bill signed according to the statute had been left at the Defendant's compting-house. Upon this his Lordship nonsuited the Plaintiff, observing, that as the Stat. 2 *Geo. 2. c. 23.* requires that the bill should either be delivered to the party personally, "or left at his dwelling or last place of abode" a month before the commencement of the action, the terms of that act had not been complied with by a delivery at the compting-house of the Defendant. Liberty however was given to the Plaintiff to move that the nonsuit might be set aside.

Delivery of an attorney's bill at the compting-house of his client one month before the commencement of an action upon the bill, is not a good delivery within the 2 *Geo. 2. c. 23.* If an attorney introduce into his bill certain items connected with his professional capacity though not immediately within the

terms of the 2 *Geo. 2. c. 23.*, and in an action upon the bill fail because it was not properly delivered according to the directions of the statute, he must fail altogether, and will not be allowed to recover for such items only.—*Quare*, Whether the same rule would not prevail if such items were not at all connected with his professional capacity.

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 v.
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The counsel for the Plaintiff did not think it worth while to controvert the above decision; but having afterwards discovered that the bill contained two *items* which could not be considered as "fees, charges, or disbursements at law, or in equity," within the meaning of the statute, *viz.* 9*l.* for costs paid upon a discontinuance, and 2*l.* 13*s.* 4*d.* for preparing a case and laying it before a special pleader; they obtained a rule to shew cause why a verdict should not be entered for the Plaintiff for those two sums.

Shepherd, Marshall, and Vaughan, Serjts. in support of the rule contended, that the *items* in question not being taxable, the Plaintiff was therefore intitled to recover upon them without the previous delivery of a bill; that although they might have become the subject of taxation if inserted together with taxable *items* in a bill which had been regularly delivered, yet as the ground of the defence in this case was, that no delivery had been made, it was not competent to the Defendant to say, that the bill had been delivered for the purpose of rendering these *items* subject to taxation, but that it had not been delivered for the purpose of defeating the plaintiff's right to recover upon it. They cited a case of *Lloyd v. Mcad, cor. Buller J. Easter 1787*, which was an action by the solicitor to a commission of bankrupt for the amount of his bill; the defence was, that no bill had been delivered, but it appearing that the bill among other *items* contained one of 7*l.* 10*s.* for money paid to the messenger, *Buller, J.* held, that the Plaintiff was entitled to recover upon that *item*; for although the money was expended because he was attorney, yet he did not expend it as attorney. They also relied on *Miller v. Towers, Peake, N. P. Cases 102.* where Lord *Kenyon* allowed the Plaintiff to give evidence of conveyancing business, though he was precluded from recovering upon the rest of his demand, on account of having omitted to deliver a bill according to the statute.

Cockell and Best, Serjts. after insisting that as the point was not made at the trial it could not now affect the nonsuit, urged that it was not competent to the Plaintiff to sever his demand; that as one part of it consisted of taxable matter, the whole became subject to the jurisdiction of the prothonotary, and that the plaintiff therefore could not recover upon any part without a previous delivery of a bill under the statute. They cited *Winter v. Payne, 6 Term Rep. 645.* in which it was admitted, that if any one *item* of the bill was taxable the Plaintiff must fail *in toto*, since no bill had been delivered according to the statute; and also a case of

Benton

Benton v. Garcia, cor. Heath, J. Spring assizes for *Kingston* 1800. where the Plaintiff having delivered a bill containing some *items* which were taxable, and some which were not, brought his action before a month had expired from the delivery, but the learned Judge held that the plaintiff could not recover for any part.

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Lord ELDON Ch. J.—In this case the question does not arise on the payment of money for the Defendant's use respecting which the Plaintiff was not called upon to exercise his skill and knowledge as attorney; but it arises upon the payment of certain sums respecting which the Plaintiff was called upon as attorney in a cause to exercise his judgment and advise his client. The rule which has been adopted concerning charges for conveyancing either stands upon no principle, or it decides this case. The expences of conveyancing as such are not taxable; they are not to be considered as "fees, charges, or disbursements at law or in equity;" but if one single *item* which may be so considered, though to the amount of 3*s.* 4*d.* only, is to be found in the bill, the Plaintiff cannot recover for the conveyancing without a delivery of such bill; for in such case the charges for conveyancing fall within the rule of the statute. And on these principles; namely, that what is paid for conveyancing is paid in the character, and in the exercise of the duties of an attorney; that a person shall not split the demand which he has in the character of an attorney; and that the statute attaches upon the whole demand which he has in that character. If that be so, how are the charges of conveyancing to be distinguished from the two *items* in the present case. In the case of *Miller v. Towers*, as no bill had been delivered the Plaintiff was not allowed to recover the costs out of pocket; but as no bill had been delivered Lord *Kenyon* felt himself at liberty to consider the demand for conveyancing in the nature of a demand made in an action for conveyancing only. Had any bill been delivered the costs out of pocket would have appeared upon the face of that bill, and these costs being taxable, the expences of conveyancing contained in the same bill, must according to all the authorities, have followed the same fate. I do not enter into the question, whether if any *items* not connected with the profession of an attorney had been included in this bill, the Plaintiff would have been precluded from recovering upon them. Perhaps however we should not feel great difficulty in holding, that an attorney who inserts his whole demand upon his client in a bill containing taxable *items*, shall be taken to agree that he will not bring an action upon any part of such demand

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until the bill has been delivered a month. Had the point now made been taken at the trial, I should have thought myself bound to hold that these were *items* fit to be inserted in a taxable bill, and that as the bill was not properly delivered they must be nonsuited upon the whole contents.

HEATH, ROOKE, and CHAMBRE, Justices, concurring,

Rule discharged.

Jan. 27th.

ASTLEY v. FRANCES WELDON.

By articles of agreement between the Plaintiff and Defendant it was agreed on the part of the former that he should pay the latter so much *per week* to perform at his theatres, with her travelling expences of removing from one theatre to another except *extra* baggage; and on the part of the Defendant, that she should perform at the theatres such things as she should be required by the Plaintiff, and attend at the theatre beyond the usual hours on any emergency and at rehearsals or be subject to such fines as are established at the theatres, and be at the

theatre half an hour before the performances begin and abide by the regulations of the theatres and pay all fines; and it was agreed by both parties that "either of them neglecting to perform that agreement should pay to the other 20*l.*" *Assumpsit* upon this agreement stating several breaches, and concluding to the Plaintiff's damage of 200*l.*—Held that the sum mentioned in the agreement was in the nature of a penalty, not of liquidated damages.

ASSUMPSIT. The declaration stated an agreement between the Plaintiff and the Defendant, whereby the Plaintiff in consideration of the services of the Defendant therein after mentioned, agreed to pay her during the term of three years the sum of 1*l.* 11*s.* 6*d.* *per week*, and to pay her travelling expences in her removal at the usual seasons of the year from the Plaintiff's Theatres in *London, Liverpool, and Dublin*, or elsewhere, save and except her *extra* luggage, which was to be paid for by herself, and the Defendant in consideration of such weekly salary agreed, that she would during the said term of three years "at the usual and accustomed time or times in each day and at all other times when required by the Plaintiff or his assigns to the best of her judgment power and ability do and perform on the respective theatres of the said Plaintiff all and every such matters and things as might from time to time be required of her as a performer or otherwise by the said Plaintiff or his assigns in the several public performances to be from time to time exhibited on the several stages of the respective theatres of the said Plaintiff either in *England Ireland or Scotland* when and as often as need or occasion should be or require and when directed or requested thereto by the said Plaintiff or his assigns; he the said Plaintiff thereby agreeing to find fit and proper theatrical dresses for the occasion; And likewise it was thereby further covenanted and agreed on between the parties aforesaid that she the said defendant should and would during the said term thereby agreed on over and above the usual and customary hours of attendance and on any

emergent

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emergent occasion attend as well as assist at either of the said theatres of the said Plaintiff in forwarding the several performances as well as attend all rehearsals at the respective theatres of the said Plaintiff or subject herself to the payment of the fines and forfeitures established in the respective theatres; And also that the said Defendant should and would on every night's public performance at the respective theatres and before the performance attend and be there at least one half hour before such public performance should begin unless permission should be had and obtained from the said plaintiff or his assigns in writing to the contrary; And also that the said Defendant should in all things conform to and duly comply with and abide by the several rules and regulations of the respective theatres in every respect in common with the several performers employed therein; and likewise pay all fine or fines that might become due and payable by means of any forfeiture or other matter cause or thing whatsoever;" Provided that the Plaintiff should have power to determine the agreement by notice in writing, and that if any of his theatres should be shut on particular occasions therein specified or the Defendant should be prevented from attending, the Plaintiff should be at liberty to deduct a proportionable part of her salary, and that if the Plaintiff should be minded to shut up his theatres sooner than the usual season, for a period not exceeding a month, he should be at liberty to stop the Defendant's salary, she being at liberty to perform elsewhere; but that if either of his theatres should remain shut for more than a month during the usual season, then the agreement should be at an end; "And lastly it was thereby agreed on by and between the said parties that either of them neglecting to perform that agreement according to the tenor and effect and the true intent and meaning thereof should pay to the other of them the full sum of 200*l.* of lawful money of *Great Britain* to be recovered in any of his majesty's courts of record at *Westminster*." The declaration then stated, that in consideration that the Plaintiff had undertaken to perform all things in the said agreement on his part to be performed the Defendant undertook to perform all things therein on her part to be performed, by virtue of which agreement the Defendant was afterwards received into the Plaintiff's service on the terms therein mentioned. It then averred, that although the Plaintiff was willing that the Defendant should remain in his service during the whole term and had performed every thing on his part to be performed yet (pro-

testing

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testifying that the Defendant had performed nothing on her part to be performed) the Defendant did not during such part of the said term of three years as was then elapsed, at the usual and accustomed times, &c. (in the words of her agreement) perform at the Plaintiff's theatres, but on the contrary thereof on &c. at &c. refused to perform such things as were exhibited on the stage of one of the theatres in the said agreement mentioned, to wit &c. notwithstanding the Plaintiff had provided proper theatrical dresses, contrary to the form and effect of the said articles of agreement and the promise and undertaking of the said Defendant so by her made as aforesaid and in breach and violation thereof; And further that the Defendant did not attend at the respective theatres half an hour before the respective performances began, but on the contrary refused to attend and absented herself without leave, contrary to the form and effect &c; And further that the Defendant voluntarily withdrew herself from the service of the Plaintiff for a long time during which she refused to perform at his theatres in the public performances which were legally exhibited during that period, contrary to the form and effect, &c. "By means of which said premises and by force of the articles of agreement and the promise and undertaking of the defendant so by her made as aforesaid she became liable to pay to the plaintiff the sum of 200*l.* in the said articles mentioned" of which she had notice and was requested to pay, but refused &c. to the Plaintiff's damage of 200*l.*

Plea, *Non assumpsit.*

The cause was tried before Lord Eldon Ch. J. at the *Westminster* Sittings in last *Trinity* Term, when the agreement having been proved, and that the Defendant absented herself from the theatre, and evidence having been adduced to shew that by the regulations of the theatre the performers are subject to certain small fines for late attendance, inebriety, &c. a verdict was found for the Plaintiff with 20*l.* damages; but liberty was reserved to the Plaintiff to enter a verdict for 200*l.* if the Court should be of opinion that the sum of 200*l.* mentioned in the agreement was to be considered in the nature of liquidated damages.

A rule *nisi* for that purpose having been obtained accordingly, *Shepherd* and *Best*, Serjts. now argued, in support of the rule, that it appeared from the tenor of the articles to have been the intention of the parties that the 200*l.* should be considered as liquidated damages; that in those cases where particular fines were

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imposed by the laws of the theatre, those fines were to be considered as the damages agreed to be paid; but for the breach of the articles in every other instance, the sum of 200*l.* was agreed to be paid, without regard to the quantum of injury which the particular breach might have created; that these articles resembled some Acts of Parliament in which specific penalties being imposed in particular clauses, and a general penalty given at the end, the general penalty operates upon all breaches of the act to which no specific penalties have been annexed; that in many cases it might be advantageous to the Defendant that the sum of 200*l.* should be considered as liquidated damages, since it might be worth while for her to pay that sum in order to be released from her engagement, whereas if it were not so considered it would be impossible for her to quit the Plaintiff's service without being liable to a new action for every day's absence; and that it appeared from the nature of the agreement to have been the intention of the parties that upon payment by either of them to the other of 200*l.* they should be released altogether; they cited the opinion of Lord Somers, mentioned *Prec. in Chan.* 487. "that where the party might be put in as good a plight as where the condition itself was literally performed, there the Court of *Chancery* would relieve though the letter of it were not strictly performed, as payment of money &c. but where the condition was collateral and no recompence or value could be put on the breach of it there no relief could be had for the breach of it;" and relied upon the following cases, *viz. Penfonby v. Adams*, 6 *Brown Parl. Cas.* 417. where it was covenanted, that if the tenant failed to reside on an estate in *Ireland* leased to him, his rent should rise from 125*l.* to 150*l.* and it was decreed that the 25*l.* additional rent was to be considered as liquidated damages; *Rolfe v. Peterson*, 6 *Brown Parl. Cas.* 470, where the same doctrine was laid down respecting a covenant that the tenant should pay 5*l. per annum* for every acre broken up and converted into tillage; *Lowe v. Peers*, 4 *Burr.* 2229, where the same was holden of a promise to pay 1000*l.* if the Defendant married any woman except the Plaintiff; and *Fletcher v. Dyche*, 2 *Term Rep.* 32. where the Plaintiff having agreed to perform certain work, and that if he did not do it in a certain time, he should "forfeit and pay to the Defendant the sum of 10*l.* for every week after the time agreed upon," the Court allowed the 10*l. per week* to be set off by the Defendant as liquidated damages

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mages, in an action on a bond brought against him by the Plaintiff.

Vaughan Serjt. *contra* observed, that the Plaintiff by assigning several breaches in his declaration had shewn that he considered the sum contained in the articles in the nature of a penalty out of which he was to recover to the amount of the injury actually sustained; and that the same appeared from the articles themselves, in which a number of stipulations of different degrees of importance were inserted, and for the breach of which very different sums must have been intended to be paid: he mentioned *Sloman v. Walter*, 1 *Brown Chan. Cas.* 418. where Lord Chancellor *Thurlow* held that a bond having been entered into by the Plaintiff to the Defendant in the penalty of 500*l.* to secure to the former the use of a room in the *Chapter Coffee-house*, the penalty being merely to secure the enjoyment of a collateral object, nothing but the damage actually sustained by breach of the agreement could be recovered; and also *Hardy v. Martin*, *ibid.* 419 *in notis*, where a brandy-merchant having purchased of his partner the good-will of the shop, and the latter having entered into a bond in the penalty of 600*l.* not to sell any brandy within five miles of the place, on payment of the damage actually sustained, the Plaintiff was restrained by the Court of *Chancery* from taking out execution for the penalty.

Lord ELDON Ch. J.—When this cause came before me at *Nisi Prius*, I felt as I have often done before in considering the various cases on this head, much embarrassed in ascertaining the principle upon which those cases were founded: but it appeared to me that the articles in this case furnished a more satisfactory ground for determining whether the sum of money therein mentioned ought to be considered in the nature of a penalty or of liquidated damages than most others which I had met with. What was urged in the course of the argument has ever appeared to me to be the clearest principle, *viz.* that where a doubt is stated whether the sum inserted be intended as a penalty or not, if a certain damage less than that sum is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. The case of *Sloman v. Walter* did not stand in need of this principle: for there by the very form of the instrument the sum appeared to be a penalty; in which case a Court of Equity could never consider it as liquidated damages, but must

direct an issue of *quantum damnificatus*. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely that if the sum would be very enormous and excessive considered as liquidated damages, it shall be taken to be a penalty though agreed to be paid in the form of contract. This has been said to have been stated in *Rolfe v. Peterfon* where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land, or wood, on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements: and if he choose to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply with propriety the word "excessive" to the terms in which parties choose to contract with each other. There is indeed a class of cases in which Courts of Equity have rescinded contracts on the ground of their being unequal.* It has been held however that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it. Necessity in these cases seems to have obliged the Courts to admit a principle nearly as loose as that to which I have before alluded. But with respect to the case of *Ponsonby v. Adams* the landlord may have set a value upon the residence of a particular tenant on his estate; and why should he not upon that ground have stipulated that if such tenant should cease to reside there his rent should rise to 150*l.*? Both in *Rolfe* and *Peterfon* and in *Ponsonby v. Adams* I should have said, that what was matter of contract bottomed on a good consideration, should not be looked upon as penalty, but should be considered as rent reserved, or liquidated damages. In *Lowe v. Peers* it is quite clear that the breach of promise of marriage was to be compensated for in damages: it was a contract that in case the party failed to perform his promise he should pay the sum of 1000*l.* The case of *Fletcher v. Dyche* is very strongly to the present purpose. In that case a bond in a penal sum was conditioned to perform certain work within a certain time, or to pay, 10*l.* for every week beyond that time. The 10*l.* *per* week was secured by the penalty of the bond: and to have said, that one term of a contract secured by a

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penal sum, should also be a penal sum, would have been absurd. Indeed Lord *Hardwicke* in *Roy v. The Duke of Beaufort* (a) was of opinion, that a person who had entered into a bond with a penalty of 100*l.* if he poached, must have paid the 100*l.* if he had committed any act which amounted to poaching. But suppose the Duke had taken a bond in a penalty of 100*l.* with condition that the obligor should not kill a partridge, or if he did, that he should pay 5*l.* in that case it is most clear that the 5*l.* must have been considered as liquidated damages. With respect to the case of *Hardy v. Martin*, I do not understand why one brandy merchant who purchases the lease and goodwill of a shop from another may not make it matter of agreement, that if the vendor trade in brandy within a certain distance, he shall pay 600*l.*; and why the party violating such agreement should not be bound to pay the sum agreed for, though if such agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference. I much wish, that the principle laid down by Lord *Somers* in *Prec. in Chau.* had been adhered to. Let us then see what this case amounts to. It was contended at the trial that the last clause is not in the form of a penal bond. It is thus "and lastly it is hereby agreed that either party failing to perform their undertaking shall pay to the other 200*l.*" *Prima facie* this certainly is contract, and not penalty; but we must look to the whole instrument. In consideration of the Defendant's services the Plaintiff undertakes to pay her 1*l.* 11*s.* 6*d.* per week, and also her travelling expences. It would be absurd to hold that, because the 1*l.* 11*s.* 6*d.* is a liquidated sum, therefore the Plaintiff could not be called upon for more, and yet that in consequence of his non-payment of the Defendant's travelling expences he should be liable to the whole sum of 200*l.* because those expences are not ascertained. Again, there are many instances of the Defendant's mis-conduct which are made the subjects of specific fines by the laws of the theatre. Are we then to hold, that if the Defendant happens to offend in a case which has been so provided for by those laws she shall pay only 2*s.* 6*d.* or 5*s.*, but if she offend in a case which has not been so provided for, she shall pay 200*l.* I can find nothing in these articles which can satisfy my mind judicially, that the 200*l.* is to be paid in one case and not in the other. The clause is general and contains no exception. If that

(a) 2 Atk. 190.

be so, the case of *Fletcher v. Dyche* is an authority strongly in point. It therefore does appear to me that the true effect of this agreement is, to give the Plaintiff his option either to proceed upon the covenants *toties quoties*, or upon the first breach to proceed at once for the 200*l.* out of which he may be satisfied for the damage actually sustained, and which may stand as a security for future breaches.

HEATH J.—I am of the same opinion. It is very difficult to lay down any general principle in cases of this kind; but I think there is one which may be safely stated. Where articles contain covenants for the performance of several things and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing such a sum shall be paid by him, there the sum stated may be treated as liquidated damages. In *Rolfe v. Peterfon* it was held that the sum mentioned was in the nature of increased rent, because it was said that the tenant was liable to distress. But if the tenant had only covenanted generally not to cut down the furze, and at the end of the lease a sum of money had been inserted to be paid in case of breach of performance of the covenants, that sum would have been in the nature of a penalty. It is a well known rule in equity, that if a mortgage covenant be to pay 5*l. per cent.* and if the interest be paid on certain days then to be reduced to 4*l. per cent.* the Court of Chancery will not relieve if the early day be suffered to pass without payment; but if the covenant be to pay 4*l. per cent.* and if the party do not pay at a certain time it shall be raised to 5*l.* there the Court of Chancery will relieve. In the present case, by the laws of the theatre, the Defendant was to pay a small sum in every case of absence, which proves that the sum to secure performance of the articles must be considered in the nature of a penalty.

ROOKE J.—The determination of the Court in construing this instrument must be guided by the intention of the parties. Now it appears very clearly from the stipulation that small sums of money should be paid in certain cases, that the parties considered the larger sum as a penalty. The case of *Fletcher v. Dyche* is very strong upon this head; and is not to be distinguished from the present case.

CHAMBRE J.—Though this in point of form is an action for damages, yet if the parties are to be considered as having stipulated for

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for certain damages, the jury ought to have been directed to find damages to the amount of the whole sum so agreed for; and the effect of the case must have been the same as if the Plaintiff had declared in debt for a penal sum. The jurisdiction of Courts of Equity in relieving on penalties is of very high antiquity. The Legislature has now adopted this practice and affords the same benefit to Defendants in actions at law: and it has lately been settled that it is not matter of election in the Plaintiff to proceed under the statute, but that the directions are compulsory, and must be pursued (a). The question is then, what is the fair presumable intention of the parties? I do not quarrel with any of the cases which have been cited. A man in possession of his own estate may set his own value upon the view, the timber, or other ornaments and conveniences of the estate, and if he part with the possession, he may part with it on the terms that the tenant shall cultivate it in such a particular way, but if he vary from that mode of cultivation then so much additional rent shall be paid. I remember that the case of *Rolfe v. Peterson* was not thought altogether satisfactory at the time when it was decided: though I do not feel any objection to the determination. The case of *Lowe v. Peers* could not be considered as any thing but a case of stipulated damages. There is one case in which the sum agreed for must always be considered as a penalty; and that is where the payment of a smaller sum is secured by a larger. In this case it is impossible to garble the covenants, and to hold that in one case the Plaintiff shall recover only for the damages sustained, and in another that he shall recover the penalty: the concluding clause applies equally to all the covenants. If any thing is to be collected from the form of this declaration, it should seem that the Plaintiff meant to sue only for the damages actually sustained. If he had declared in debt and assigned breaches he would have been considered as having made his election to proceed under the statute, and by varying the form of the action he shall not elude the statute. I rely on the form of the instrument and on the statute of *William*. With respect to the case of *Hardy v. Martin*, in which I was concerned, Lord *Mansfield* upon the trial at law inclined to think it a case of stipulated damages: though I see by the printed Report that it was considered otherwise in the Court of Equity.

Rule discharged.

(a) See *Rolfe v. Rosewell*, 5 Term Rep. 538. and *Hardy v. Bern*, 5 Term Rep. 636.

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Jan. 27th.

WHITBURN v. STAINES.

ASSUMPSIT. The first count of the declaration was upon an award; which was followed by the common counts.

Bayley Serjt. applied for a rule *nisi* to change the *venue* from *Middlesex* to *Suffex*; and observed, that although in actions on some instruments the Courts had refused to change the *venue*, yet that in the case of *Pinkney v. Collins*, 1 *Term Rep.* 571. where the Court refused to change the *venue* in an action on a bill of exchange, the reason given was, that such instruments were *bona notabilia* in any county, which does not apply to an award.

Upon this *Chambre J.* read a manuscript note of a case of *Orme v. Almay*, B. R. M. 26 Geo. 3. where the Court refused to change the *venue*, the action being on a note to pay 15*l.* if the Defendant did not compleat his contract for an inn purchased at an auction, which was not a negotiable note.

Bayley then urged that the Plaintiff ought to be bound to confine his evidence to the count on the award, as in *Maugir v. Hinds*, Barnes 487. *ed.* 3.; or at least should undertake to give evidence on that count at the peril of a non-suit, as in *The Duke of Bedford v. Bray*, Barnes 491. *ed.* 3.; for unless the Court should put Plaintiffs under these terms, they would always be at liberty to lay the *venue* where they pleased, by introducing a count upon an instrument which never existed.

The Court intimated an opinion that the application could not succeed but offered to grant a rule *nisi*.

Whereupon *Bayley* desired to take nothing by his motion.

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Jan. 28th.

THE Defendant in this case was held to bail upon an affidavit made by the Plaintiff and one *Robert Geddes*. In that affidavit the Plaintiff deposed "that at the time of making the assignment

of the assignment thereafter mentioned, the Defendant was indebted to him on a bill of exchange, and that he afterwards assigned the debt by indenture to *A. B. C.* and *D.* in trust. *A.* then deposed that at the time of the affidavit being made the Defendant was indebted to them *A. B. C.* and *D.* as such trustees and assignees aforesaid. Held that the affidavit was insufficient, because it did not deny that the debt had been satisfied to the Plaintiff between the assignment and the time of the affidavit being made. But a supplemental affidavit was allowed.

In an affidavit to hold to bail the Plaintiff deposed that at the time

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hereinafter mentioned the Defendant was justly indebted to him the Plaintiff in the sum of 37*l.* as the acceptor of a bill of exchange payable to the order of *Thomas Watson* and duly indorsed to the Plaintiff and that the Plaintiff by a certain indenture bearing date, &c. assigned the said debt among divers other debts and effects to the other deponent *Robert Geddes* together with *J. L.*, *J. C.*, *W. M.*, and *J. H.* in trust for the benefit of the creditors of the said Plaintiff." *Robert Geddes* then deposed "that the Defendant is justly and truly indebted to him and the said *J. L.*, *J. C.*, *W. M.*, and *J. H.* as such assignees and trustees as aforesaid in the said sum of 37*l.* upon and by virtue of the said bill of exchange and the said assignment." Lastly, the Plaintiff and *Geddes* deposed "for themselves and each of them that no tender of the said sum of money or any part thereof hath been made in any note or notes of the Governor and Company of the Bank of *England* expressed to be payable on demand."

A rule *nisi* having been obtained for discharging the Defendant upon a common appearance;

Vaughan, Serjt. in support of the rule contended, that it ought to appear by the affidavit that the Defendant was indebted to the Plaintiff on record at the time of the affidavit made; whereas in this case it only appeared that the Defendant was indebted to him at the time of the assignment.

Bayley, Serjt. *contra* insisted that in cases like the present, it was quite sufficient if the assignees who have the equitable interest swear that the Defendant is indebted to them as such assignees at the time of the affidavit made: he cited *Creswell v. Lovell*, 3 Term Rep. 418.

Lord ELDON, Ch. J. said, The case of *Creswell v. Lovell*, as far as it affects that now before the Court, seems to have been founded upon the authority of some cases of legal assignees; which cases do not appear to me to bear any analogy to it; for neither in *Creswell v. Lovell*, nor in this case, could the action be brought in the name of the assignees. Though the Plaintiff in the present instance swears that the Defendant was indebted to him at the time of the assignment, yet subsequent to that time the Plaintiff may have received the money and given a discharge; and consequently, it is possible consistently with the Plaintiff's affidavit that nothing may have been due at the time of the affidavit made. If however the Plaintiff had added that subsequent

to the assignment nothing had been paid to him, the affidavit would have been sufficient. 1801.

Bayley then applied for leave to file a supplemental affidavit in order to make that addition (a); which after some opposition was granted.

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(a) Vide *Garnham v. Hammond*, ante, 298.

TIPPING v. JOHNSON.

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A RULE having been obtained by *Bayley* Serjt. calling on the Plaintiff to shew cause why the execution sued out in this case should not be set aside for irregularity, 1st, Because it had been sued out after service of the allowance of a writ of error; 2dly, Because it was sued out by an attorney different from the one who had been attorney in the cause, and no order for changing the attorney had been obtained (a);

Plaintiff may sue out execution by a different attorney from the attorney in the cause, without obtaining an order of Court for changing the attorney.

Shepherd, Serjt. as to the first point produced an affidavit stating a declaration of the Defendant, that the writ of error was sued out for delay; and was proceeding to argue on the second point,

When *HEATH*, J. said, that it appeared by several cases collected in *Rol. Abr.* (b) that the authority of an attorney determines with the judgment and therefore no order to change the attorney was necessary.

Per Curiam,

Rule discharged with costs.

(a) See *Reg. Gen. A.D.* 1654. *B. R. f.* 10. *C. B. f.* 13. *Kaye v. De Mattos*, 2 *Bl.* 1323. and *Macpherson v. Ruisjon*, *Doug.* 217.

(b) Vol. 1. fol. 291. *M.* But the attorney in the suit may sue out execution within a year after the judgment without a new warrant 2 *Inst.* 378.; or sue out a *scire facias* against bail, and pray an *alias*. *Burr v. Atwood*, 1 *Salk.* 89; though when the *scire facias* is returned there must be a new warrant. *ibid.* Indeed the reason given by *Holt*, Ch. J. why he may sue out the *scire facias* is, that any one might sue out or

pray the *scire facias*, and therefore the old attorney might. It is also laid down, that the attorney after judgment may acknowledge satisfaction on the record, upon receiving the money, 1 *Rol. Rep.* 366; or even without having received the money, *Per Dodderidge* and the clerks, though *Coke* thought otherwise, 1 *Rol. Rep.* 367. In 1 *Rol. Abr.* 291. l. 10. it is said that the attorney after judgment cannot release damages; but in *Lamb v. Williams*, 1 *Salk.* 89. it was determined that he might.

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KERR v. SHERIFF.

If the writ be that the Defendant answer "in a certain plea of trespass on the case on promises" and the declaration be in debt "for goods sold and delivered and money borrowed" the Court will discharge the Defendant on entering a common appearance.

A RULE *nisi* was obtained in this case for entering a common appearance and having the bail-bond delivered up to be cancelled, on the ground of a variance between the writ and the declaration; the *ac etiam* clause of the *capias* being, that the Defendant should answer "in a certain plea of trespass on the case on promises to the damage of the Plaintiff, &c." and the declaration being debt for goods sold and delivered and money borrowed.

Shepherd, Serjt. now shewed cause, and contended that the Court would look to the affidavit to hold to bail, to see whether the same cause of action had been pursued in the declaration as that for which the Defendant had been arrested, and that the affidavit in this case being "for money lent and advanced" the same cause of action had been pursued; he admitted that if the affidavit be for trover and the declaration on promises the Court will discharge the Defendant on common bail, under 13 *Car. 2. st. 2. c. 2.* as was done in *Tetherington v. Golding*, 7 *Term Rep.* 80; and that on the same ground proceeded the cases of *De la Cour v. Read*, 2 *H. Bl.* 278. and *Spalding v. Mure*, 6 *Term Rep.* 363, whereas the only question in this case was, whether the Court would discharge the Defendant because the declaration was debt on promises instead of case on promises.

Vaughan, Serjt. *contra* observed, that the case depended on the statute of *Car 2.*, and that in *Lockwood v. Hill*, 1 *H. Bl.* 310. where the *ac etiam* was case on promises, and the declaration was in debt, an application to discharge the Defendant was only refused because the sum sworn to was under 40*l.*; in which case the *ac etiam* not being necessary, the variance was immaterial. He cited a case of *Barnes v. Trompowsky*, *K. B.* where the *ac etiam* being in covenant, and the affidavit to hold to bail on a foreign charter-party, the Plaintiff having declared in debt on the charter-party the defendant was discharged on common bail: and also urged that if in these cases the Court did not interfere bail would be made liable for causes of action for which they did not mean to bind themselves.

The Court observed, that the condition of the bail-bond expressed the cause of action, and in so doing followed the words of the *ac etiam* clause literally, and that therefore if the Plaintiff's declaration

declaration varied from his writ, the Defendant could never be said to be condemned in the action mentioned in the condition, so as to charge the bail.

Per Curiam,

Rule absolute (a).

(a) Where a writ is sued out by Plaintiffs as executors, and a declaration is afterwards delivered in their own right, the Court will discharge the Defendant on filing common bail. *Douglas and others v. Irlam*, 8 Term Rep. 416. So if Plaintiff take out a writ in his own name and declare as executor; or

sue out a writ *quare clausum fregit*, and declare in trover; *Per Cur.* 5 Term Rep. 402. But if the writ be in debt for a sum certain, and the declaration in debt also but for a less sum, the Court will not discharge the Defendant. *Turing v. Jones*, 5 Term Rep. 402.

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HAWKINS v. ECKLES, WILSON, SMITH, and ROUTH.

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REPLEVIN of cattle.

1st, The Defendant *Routh* in his own right and the other defendants as his bailiffs acknowledged the taking, because the Defendant *Routh* was seised in his demesne as of fee of and in a certain messuage with the appurtenances situate, &c. "and the said *Routh* and all those whose estate he now has and at the same time when, &c. had, of and in the said messuage, &c. with the appurtenances from time whereof, &c. have had and have been used and accustomed to have and of right during all the time aforesaid ought to have had, and the said *Rouths* till of right ought to have common of pasture in and throughout the said place in which, &c. called, &c. for two cows or heifers as to the said messuage with the appurtenances belonging and appertaining:" they then acknowledged the taking of the cattle as damage feasant, and prayed a return.

2dly, The Defendant pleaded by way of justification "that the said *Routh* before and at the said time when, &c. was possessed of a certain other messuage with the appurtenances situate, &c. and that the said *Routh* being so possessed thereof before and at the said time when, &c. was lawfully entitled to and of right ought to have had common of pasture in and throughout the said place in which, &c. to depasture the same at the said time when, &c. with two cows or heifers as to the said last mentioned messuage with the appurtenances belonging and appertaining." They then

In an avowry Defendant averred that all those whose estate he now has, &c. from time whereof, &c. have been accustomed to have and of right during all the time aforesaid ought to have had and still of right ought to have common of pasture in the locus in quo—Held bad, and that it did not amount to an averment of right of common at all times of the year. If defendant in replevin plead by way of justification of the taking that he was possessed of a messuage with com-

mon appurtenant, and that the Plaintiff's cattle were damage feasant on the common, and conclude in bar, without praying a return, it seems that such a plea is bad.

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averred, that the cattle were damage feasant, so that the said *Routh* could not enjoy his common *tam amplo modo*, and therefore the said *Routh* in his own right and the other Defendants, as servants of the said *Routh*, took them and detained them as a distress for such damage; and concluded by praying judgment *si actio*, &c.

3dly, The Defendants also pleaded by way of justification, that the Defendants *Wilson* and *Smith* were *possessed* of the place in which, &c. with the appurtenances, and being so possessed thereof the said two Defendants in their own right, and the other two as their servants, took the cattle damage feasant; concluding as in the second plea.

The Plaintiff demurred specially, and assigned for causes, "that the said Defendants have not shewn in the first avowry and cognizance at what time or times and when nor for what period of time the said Defendant *Routh* is entitled to common of pasture in the said place in which, &c. but have only alleged that he has common of pasture in the said place in which, &c. generally without specifying whether he has common every year and at what period of the year or how otherwise, so that it does not appear that the said Defendant *Routh* at the time of taking the said heifers had any right of common in the said place in which, &c. And also for that said Defendants have in their said second avowry and cognizance stated that said Defendant *Routh* was possessed of a certain messuage and as such was lawfully entitled to common of pasture in the said place in which &c. which allegation is too general and no certain issue can be taken either upon the possession of said Defendant *Routh* of the said messuage or upon title to common of pasture in the said place in which, &c. And also for that it is alleged in the last avowry and cognizance that the said Defendants *Wilson* and *Smith* were possessed of the said place in which &c. whereas it ought to have been stated that some person was seised thereof in fee and deduced a title to the said messuage from such person to the said Defendants *Wilson* and *Smith*. And also for that the second and last avowries and cognizances begin and conclude in bar of the action instead of averring and acknowledging respectively the taking of the said heifers and praying a return of them. And also for that all the said avowries and cognizances are defective, uncertain, and want form, &c."

Williams Serjt. in support of the demurrer, after stating it to be "a common learning that avowries must shew a good title in

omnibus"

omnibus" so as to entitle the Defendant to a return, and citing *Goodman v. Ayling*, *Yelv.* 148. *Matthews v. Cary*, *Carth.* 74. *Salk.* 107. *S. C.* and *Butt's case*, 7 *Co.* 23., was proceeding to argue on the pleas,

When *Vaughan* Serjt. was called upon by the Court to state the grounds on which he thought the demurrer might be resisted. In respect of the avowry he observed, that as it was averred that the avowant and all those whose estate he had, "from time whereof the memory of man was not to the contrary," were accustomed to have a right of common, "and during all the time aforesaid" of right ought to have had it, it amounted to an averment that the avowant was entitled to common at all times of the year, and that if any right more limited than that had been proved at the trial, the avowry could not have been supported. As to the pleas, he said, that he meant to contend that they amounted to a sufficient justification of the taking; and that it was not necessary in a mere justification to shew a title in *omnibus* (a), as no return is prayed (b).

• But

(a) In trespass it is sufficient to justify under a *possession* if the title does not come in question. As in assault and battery and *molliter manus* pleaded. *Ekeville v. Avery*, *Cro. Car.* 138. So in *quare clausum fregit* Defendant may plead that he was *possessed* of a close called A, and the Plaintiff of a close called B., that the latter ought to repair the fences, and that for default thereof Defendant's cattle escaped into B. *Faldo v. Ridge*, *Yelv.* 74. So to trespass for taking cattle, possession of the *locus in quo* for a term of years was pleaded, and that the cattle were damage feasant therein. *Anon.* 2 *Salk* 643. *Searl v. Bunion*, 2 *Mod.* 70. *Langford v. Webber*, 3 *Mod.* 132. And in *Randle v. Dean and Another*, *Lutw.* 1496, which was trespass for beating the Plaintiff's servants and horses, the Defendant pleaded that he was possessed of the *locus in quo*, and that the servants and horses were damage feasant. The Reporter indeed observes at the end of this last case, that no exception was taken, that possession only was pleaded without shewing what estate; but had it been taken it should seem from the current of authorities that it would not have availed. There is however a case in *Moor* 846. *Smith v. Bull*, where the Defendant in an action of assault and battery having pleaded that he *molliter manus imposuit* on the Plaintiff who entered

into his close, the Court held that the Defendant should have shewn what estate he had in the close, and that the Plaintiff came to eject or dispossess him, but it is observable that there the Defendant did not aver that he was in possession, but only that it was *his* close, which might be true, and yet he not in possession: independent of which this case stands contradicted by the authority of *Osway v. Bristol*, 10 *Mod.* 37. where the Defendant in trespass having justified taking the Plaintiff's cattle, because they were damage feasant *in clauso suo*, it was held good. Indeed the doctrine that possession may be pleaded in trespass is confirmed by a late case. *Taylor v. Eastwood*, 1 *Enst.* 212; though it was there resolved, that such a plea might be answered by replying title in a third person.—But in replevin, where an avowant pleaded generally, that he was seized of the *locus in quo* without laying of what estate, and avowed that he took the cattle damage feasant, and prayed a return, the avowry was held bad. *Saunders v. Hussey*, 2 *Lutw.* 1231. *Carth.* 9. *S. C.* 1 *Ld. Raym.* 332. *S. C.* Indeed in *Langford v. Webber*, 3 *Mod.* 132. where possession was pleaded in justification of trespass, it was admitted *arguendo*, that it might have been otherwise in replevin; and in *Silly v. Dally*, 1 *Ld. Raym.* 331. this precise point came before

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But *The Court* being clearly of opinion that the avowry was bad offered the Defendants leave to amend, intimating that if they persisted in arguing the pleas they must do it at their peril, since they would not be allowed to amend, if upon argument the Court should hold the pleas to be bad.

On hearing this *Vaughan* consented to amend on payment of costs.

before the Court, and a consuance by the Defendant as bailiff to J. T. stating that the grandfather of J. T. being possessed of the *locus in quo* leased the same for years, and deriving a title to the lease to J. T., was held bad. In that case was cited *Pasley v. Seymour*, 2 Show. 484. where an avowry of this kind was held good; but the Court expressly denied that case to be law; and the decision in *Silly v. Dally*, is confirmed by *Challoner v. Clayton*, 3 Salk. 306. Comb. 472. S. C. and *Freeman v. Jugg*, 3 Salk. 307. in which last case however the Court held that the objection must be taken advantage of on demurrer, and cannot prevail

in arrest of judgment. From the above cases it appears to have been determined that in a justification of trespass where the title does not come in question possession alone may be pleaded, but in an avowry or consuance in replevin it cannot. Whether it may be pleaded in replevin where the taking only is justified, and no return prayed, does not appear to have been hitherto expressly decided.

(b) There are many instances in which the Defendant in replevin cannot avow, but can only plead a justification of the taking, in which cases he is not to pray a return. See *Gilbert's Replevin*, c. 7. s. 3. p. 132. ed. 2.

Feb. 5th.

STEEL v. ALAN.

If a person against whom a commission of lunacy has issued, be arrested, the Court of Common Pleas has no power to discharge him.

MARSHALL Serjt. moved to discharge the Defendant out of custody upon a common appearance, on the ground of his being a lunatic, and a commission of lunacy having issued against him previous to the arrest.

LORD ELDON Ch. J.—I am afraid that there is no prohibition in the law of *England* from arresting a lunatic. I have often known the Court of *Chancery* go out of its jurisdiction in order to assist a lunatic in this respect; and order a Master to take an account of his debts, considering it to be for the benefit of the lunatic that they should be paid, as he would otherwise be subject to arrest by all his creditors.

Marshall took nothing by his motion (a).

(a) The Court of *King's Bench* rejected similar applications in *Kernot and Another v. Norman*, 2 Term Rep. 390. and *Nutt v. Verney*, 4 Term Rep. 121.; in the former of

which cases it appeared by affidavit that the Defendant had become insane after the arrest, and in the latter that he was insane at the time of the arrest.

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HIFFERMAN v. LANGELE.

THE declaration in this case, which was a town cause, was delivered *de bene esse* on the 17th of November, indorsed "to plead in —." On the 19th the Defendant obtained an order for a particular, which was complied with on the 20th, and on the 21st judgment was signed for want of a plea.

The Court on a motion to set aside the judgment, held that the indorsement on the declaration amounted to a notice to plead according to the rules of the Court, *viz.* in four days; that the time for pleading was not suspended by the order for a bill of particulars; and that although a Plaintiff cannot sign judgment until the order for a particular has been complied with, yet he may do so immediately after having delivered the particular, provided the time for pleading be then elapsed.

Bayley Serjt. for the Plaintiff.

Shepherd Serjt. for the Defendant.

If a declaration be indorsed "to plead in —," it must be understood to mean within the number of days allowed by the rules of the Court. An order for a bill of particulars does not suspend the time for pleading; and therefore Plaintiff may sign judgment immediately after delivering the particular, if the time for pleading be then out.

SINCLAIR v. CHARLES PHILLIPE, Monsieur de France.

Feb. 5th.

THE Defendant in this case was arrested and holden to bail on the following affidavit. "T. G. Sinclair of, &c. maketh oath that Charles Phillipe is justly and truly indebted unto him this deponent in the sum of 589*l.* and upwards for money had and received to and for the use and on the account of the said T. G. S. and for money by the said T. G. S. paid laid out and expended lent and advanced in England to and for the use and on the account of the said Charles Phillipe and for interest due thereon and upon an account stated in England." The Plaintiff then negatived any tender in bank notes.

The Defendant an alien within the terms of the 38 Geo. 3. c. 39. s. 9. having entered into an agreement with the Plaintiff in a foreign country, the latter in pursuance of the agreement laid out money in England, after which the parties came to an adjust-

On a former day Shepherd Serjt. obtained a rule *Nisi* for discharging the Defendant on a common appearance under the 38 Geo. 3.

ment in England, and the Defendant acknowledged the debt. The Defendant having been holden to bail for money laid out by the Plaintiff in England and on an account stated in England, disclosed the above circumstances, by affidavit, upon which the Court discharged him upon a common appearance.

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c. 50. s. 9. (a), and produced an affidavit stating that the Defendant was an alien abiding in this kingdom and a person who quitted his country of *France* by reason of the revolution and troubles in *France* in 1789; that in 1791 the Defendant together with his brother *Louis Stanislaus Xavier* since King of *France*, being resident at *Coblentz* in *Germany*, entered into an agreement with the Plaintiff respecting his raising men for the service of the King and Princes of *France*, and that he was not indebted to the Plaintiff in any sum of money whatsoever contracted in the dominions of his Majesty King *George* the Third, to the best of his knowledge and belief, or on any other account, or otherwise, or elsewhere than in consequence of the said agreement made at *Coblentz*, and that he verily believed the Plaintiff's demand arose out of the said agreement.

Best Serjt. now shewed cause against the rule, and relied on an affidavit of the Plaintiff, which alleged that he had expended in *England*, previous to the Defendant's arrival here, several sums of money in pursuance of the above-mentioned contract, and also that several adjustments of his demands had taken place in this country, upon which occasions the Defendant acknowledged himself indebted to the Plaintiff in considerable sums. He argued from thence that though the commencement of these transactions took place out of *England*, yet that as money had been expended and an account had been stated in *England*, there was a sufficient debt to support the arrest notwithstanding the 38 *Geo.* 3. He also urged, that the affidavit being positive with respect to the debt arising in *England*, it was not competent to the Defendant to controvert that fact, and that if there was any ambiguity on the face of the affidavit the Court would allow the Plaintiff to explain it by a supplemental affidavit.

Shepherd and *Runnington* Serjts. in support of the rule were stopped by the Court.

(a) Which provides "that aliens abiding in this kingdom having quitted their respective countries by reason of any revolution or troubles in *France* or in countries conquered by the arms of *France* shall not be liable to be arrested, imprisoned or held to bail or to find caution for the forthcoming or paying any debt, nor to be taken in execution on any judgment nor by any caption for or by reason of any debt or other cause of action contracted or arising in any parts

beyond the seas other than the dominions of his Majesty while such aliens were not within the said dominions of his Majesty; and in case any such alien shall have been or shall be arrested &c. contrary to the intent of this act, such alien shall be discharged therefrom by order of any of his Majesty's Courts in *Westminster Hall*, or of the Courts of Session in *Scotland*, or of any Judge of such Courts in vacation time."

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Lord ELDON Ch. J. The case of this illustrious person must be decided on the same grounds that would operate in favour of the meanest individual falling within the purview of the 38 *Geo. 3.* Whether under the circumstances stated to the Court he does fall within the description of persons entitled to be relieved by that act, is the question for us to decide? It appears to me that he is entitled to be discharged, first, because the affidavit under which he has been holden to bail is not sufficiently distinct to meet that case in which the act prohibits the arrest of an alien abiding in this kingdom having quitted his country by reason of the troubles in *France*. It would have been very easy for the Plaintiff to have stated, that the Defendant was indebted to him in a certain sum of money for a debt not contracted or arising in parts beyond the seas; but this affidavit may be equally true whether the debt were contracted or arose within or without the kingdom. For though the money is said to have been paid in *England*, yet the contract being in *Germany* the debt in the eye of the law arises there, and is not altered by the locality of the expenditure. Had no other affidavit therefore been produced to the Court on the part of the Plaintiff, I should be of opinion that in a case where the original affidavit is so guardedly sworn, no supplemental affidavit ought to be allowed. But taking the affidavit now produced by the Plaintiff as a supplemental affidavit, it does not appear to me to state sufficient grounds for holding the Defendant to bail, for notwithstanding the transactions and adjustments subsequent to the original contract the debt still remains a debt within the meaning of the statute. These adjustments amount to nothing more than an endeavour to provide for the original debt, and if the Court were to hold that every acknowledgment of such a debt created a new demand it would be the means of preventing these persons to whom the act extends from furnishing to their creditors any vouchers against that period when they should be enabled to pay, or having any the most honourable and well-intentioned communication with them. It has been said, that it is not competent to the Defendant to controvert the affidavit to hold to bail; but had there been more doubt than there is upon the question of law I am inclined to think that the Defendant's affidavit ought to have been admitted; for where the right to be discharged depends upon a question of law it would be very harsh to say, that because the Plaintiff has undertaken to swear positively to a point the truth of which must depend on an

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accurate legal investigation, the Defendant must therefore lie in gaol.

HEATH J. It appears that this affidavit was drawn with a view to the Act of Parliament; but it does not state a case exempt from the provisions of the act. It does not speak of any contract in *England*, but merely of money paid and laid out in this country, whereas it is the original contract which the act contemplates. There are two periods to be considered; the 1st, before this Defendant came to *England*, the 2d, since his residence here. During the 1st there is no pretence to say that the Defendant was not within the operation of the act, the contract having been made abroad. With respect to the 2d it is said that the adjustments and settlements which have since taken place are to be considered as equivalent to new promises and new debts; but if that were so, the consequences of the act would be very fatal to honourable men. For what honourable man being asked whether he owed a debt contracted abroad would not immediately acknowledge it, or being desired to adjust it, would refuse so to do? The property of persons in the Defendant's situation may be resorted to, and if the evidence they themselves afforded so as to affect that property were to affect their persons also, and deprive them of the protection afforded by Parliament, the intention of the Legislature would be completely defeated.

ROOKE J.—I am of the same opinion, and should not add any thing to what has been said by my Lord and my Brother *Heath*, if I did not think it necessary to declare my opinion that it would be of very dangerous consequence to hold, that an honourable acknowledgment made in *England* of a debt contracted abroad would charge the person in the Defendant, when his person would not be chargeable by reason of the contract itself.

CHAMBER J.—I am clearly of opinion that the act intended to refer to the original contract. It has been argued that the account stated in *England* amounts to a new cause of action; but unless we consider the act as looking to the original transaction, the protection which it holds out would be merely delusive. A Plaintiff may proceed to judgment against the property of a person within the protection of the act; now a judgment is technically speaking a new cause of action; but it would be absurd to hold that the same act which meant to prevent the imprisonment of a particular class of persons for particular debts, meant also to permit a new cause of action to be raised against them by a judgment against their property,

property, which cause of action should lead to the imprisonment of their persons.

Rule absolute.

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DAVIES and Others, Assignees of SHIVERS a Bankrupt, Feb. 9th.
v. CHIPPENDALE.

THIS was a rule *nisi* for setting aside an interlocutory judgment signed under the following circumstances. The Defendant (*Vid. ante*, p. 282.) having been continued in custody under a detainer for 1,300*l.* a declaration was delivered on the 8th of *November* last; special bail was put in to the action in the country on the 24th of the same month, and on the same day notice served that the bail would justify by affidavit on the 28th; the justification was opposed on the ground of the Plaintiff's not having had time to inquire into the sufficiency of the bail, but a rule was obtained for a justification before a judge at chambers; on the 2d of *December* notice was served of the Defendant's intention to justify bail on the 4th of the same month, on which day they did justify without any opposition; but on the 3d of *December* the Plaintiff had signed judgment for want of a plea, though no plea had ever been demanded.

If a prisoner be prevented from justifying ear by the Plaintiff's desiring further time to enquire into their sufficiency, he is from the time of his notice of justification intitled to a demand of a plea before judgment can be signed against him.

Bayley Serjt. shewed cause and contended that the Defendant being in custody till his bail were actually justified, no demand of a plea was necessary, inasmuch as a prisoner is bound to plead without any demand of a plea (*a*), and that in this case the judgment being signed on the 3d of *December*, when his bail had not justified, was a judgment regularly signed as against a prisoner.

Best, Serjt. *contra*, insisted that as the Defendant was only prevented from justifying his bail on the 28th of *November* by the Plaintiff's desiring further time to inquire after the bail, the former must be considered from the 28th as a person entitled to a demand of a plea before judgment could be signed against him.

The Court expressed themselves clearly of this opinion.

Rule absolute.

(a) If he be in the custody of the sheriff; *secus* if in the custody of the marshal. *Roye v. Christfield*, 1 *Term Rep* 551. But even in the latter case no demand of a plea is necessary if the prisoner has been removed out of the custody of the sheriff without notice to the Plaintiff. *Wilkinson v. Brown*, 6 *Term Rep* 524.

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VOLLUM v. SIMPSON.

If Plaintiff in replevin plead several pleas in bar upon which issues are joined, and some issues are found for the Plaintiff and some for the Defendant, the latter is intitled to such costs of the trial as relate to the issues on which he has succeeded as well as to the costs of the pleadings.

THIS was an action of replevin; in which the Defendant made two cognizances. To each of the cognizances the Plaintiff pleaded three pleas in bar, whereupon six issues were joined. At the trial a verdict was found for the Plaintiff on the 1st, 3d, and 6th issues, and for the Defendant upon the 2d, 4th, and 5th. In taxing costs the Prothonotary allowed to the Plaintiff the costs of so much of the pleadings, briefs, and witnesses as related to the issues upon which he had succeeded, amounting to 125 *l.* 15 *s.*, and to the Defendant, in the same manner, the costs of so much of the pleadings, briefs, and witnesses as related to those issues upon which he had succeeded, amounting to 127 *l.* 3 *s.*

The Prothonotary having reported to this effect;

Heywood Serjt. now moved that he might be ordered to review his taxation, arguing thus—Although the Plaintiff, according to the rule lately laid down by the Court (a), may not be entitled to the costs of the issues on which he has failed, yet the Defendant can only be entitled to the costs of the pleadings on those issues, not to any costs of the trial. The Stat. 4 *Ann. c.* 16. after enacting in *§.* 4. that any Defendant or Tenant in any action, or suit, or any Plaintiff in replevin may plead several matters, provides in *§.* 5. “that if any such matter upon demurrer joined, be judged insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the Plaintiff or Demandant, costs shall be also given in like manner, unless the Judge who tried the said issue shall certify that the Defendant, or Tenant, or Plaintiff in replevin, had a probable cause to plead such matter which upon the said issue shall be found against him.” In case of a verdict therefore costs are to be allowed in like manner as upon demurrer; but on demurrer there can be no costs but of the pleadings. Nothing but the costs of the pleadings appear to have been allowed in *Dodd v. Joddrell*, 2 *Term Rep.* 235. and in the case of *Page v. Creed*, 3 *Term Rep.* 391. it was expressly said by the Court, that “the Statute 4 & 5 *Ann.* only gives the costs of those pleadings;” and that it was not intended thereby to repeal the statute of the 22d and 23d of *Car. 2. c.* 9. which enacts that if the Plaintiff recover under 40 *s.*

(a) Vid. *Penfon v. Lee*, ante, 330.

in assault and battery, he shall recover no more costs than damages : now if a Defendant in such an action plead several matters and the Plaintiff be entitled to all the costs of trial relating to those issues on which he succeeds though he recovers *1s.* damages only, the whole effect of the Statute of *Car. 2.* will be defeated. The only case to support the present taxation in the Defendant's favour is that of *Brooke v. Willett*, 2 *H. Bl.* 435 ; But in that case the only authorities cited in the Defendant's favour and on which the judgment may be supposed to have proceeded were *Butcher v. Green*, *Dougl.* 678. and *Dodd v. Joddrell* ; the former of which cases was inapplicable to the point in contest, and the latter is subject to the explanation above stated.

Cockell Serjt. *contra* relied on *Brooke v. Willett*.

LORD ELDON Ch. J.—We are informed by the Prothonotary, that it has been the invariable practice of the Court to tax the costs in the manner which is now contended to be incorrect. The very point now in dispute came directly before this Court in 1795, in the case of *Brooke v. Willett*, at which time this Court, after having made inquiry of the Judges of the Court of *King's Bench*, held that the practice which had prevailed was consistent with the true construction of the act. It is sufficient for me to add, that on looking into the statute the practical construction appears to me to be consistent with the words used in the act. Indeed if I had doubts upon the subject, I think my doubts ought to be controlled by the uniform practice of the Court.

HEATH J.—The statute of *Anne* being a remedial statute ought to be so construed as to advance the remedy. The costs intended to be given appear to me to be all those costs which follow the unnecessary plea. This construction is analogous to that which has been put upon the statute of *Gloucester*, by which the costs of the writ only are given to the Plaintiff if he succeed, and yet that statute has always been held to give all the costs of the suit.

ROOKE and CHAMBRE Justices concurring,

The Prothonotary's Report was confirmed.

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MEAGHER v. VANDYCK.

A writ of error operates as a *superfedeas* from the time of the allowance, though it be not served till after execution.

THE Defendant in this case having sued out a writ of error, obtained an allowance thereof at 12 o'clock at noon on the 28th of January, but did not serve the allowance on the Plaintiff before half past six on the same day; in the mean time the Plaintiff sued out a *scire facias* and levied on the Defendant's goods. A rule *Nisi* having been obtained to have this execution set aside and the goods restored to the Defendant,

Clayton Serjt. shewed cause and contended, that although the allowance of the writ of error might amount to a *superfedeas* where the *fi. fa.* has not been executed, yet that if execution has taken place before the service, the allowance will not have the effect of avoiding the execution, and thereby making the sheriff a trespasser. He mentioned *Incedon v. Clarke*, Barnes 212. to shew that though under a *ca. fa.* the person shall be discharged, yet in the case of a *fi. fa.* the proceedings so far as the sheriff hath gone must stand.

Best Serjt. in support of the rule, insisted that the allowance is a *superfedeas* of all proceedings on the judgment, and that the service has no other effect than to bring the party into contempt; *Jaques v. Nixon*, 1 Term Rep. 279 *Lane v. Bacchus*, 2 Term Rep. 44. and *Meriton v. Stephens*, Barnes, 205.

The Court at first inclined to think that as the execution had taken place before notice of the allowance it would be going too far to hold the sheriff a trespasser, but took time to consider of their opinion.

On this day Lord ELDON Ch. J. said—Upon looking into the authorities and considering this question, we are fully satisfied that the writ of error must be deemed a *superfedeas* from the time of the allowance (a), and that the execution of the *fi. fa.* was therefore irregular.

Rule absolute.

(a) Vid. *Grawall v. Stimpson*, ante, vol. 1. p. 478.

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A. VERDICT in this case having been taken for the Plaintiff by consent, subject to the award of an arbitrator, and the order of reference made a rule of Court, the arbitrator found that the Plaintiff was indebted to the Defendant in 95*l.* 14*s.* 9*d.* on the balance of an account between them for money lent, advanced, and paid by the latter, and awarded that sum to the Defendant. He then proceeded as follows: "And I also find and determine that the said Plaintiff is further indebted to the said Defendant in the sum of 680*l.* 2*s.* being one moiety of divers sums of money paid by the Defendant for and on account of losses on policies of insurance underwritten by agreement between the said Plaintiff and the said Defendant at their joint risk and for their joint benefit," and accordingly awarded that sum to the Defendant.

A rule *Nisi* having been obtained on a former day for setting aside this award;

Cockell and *Vaughan* Serjts. now shewed cause. The arbitrator has stated upon the face of the award the circumstances under which the 680*l.* 2*s.* has become due for the purpose of taking the opinion of the Court, whether the Defendant be entitled to recover the money so paid on account of an illegal partnership. Although it be illegal for underwriters to enter into partnership, yet they are liable to the insured for the amount of the sums underwritten, since it is not competent to them to set up the illegality of their own conduct by way of defence (a) and therefore as the Defendant has only paid on behalf of the Plaintiff what the Plaintiff himself would have been bound to pay, the former is entitled to recover the amount as money paid to the use of the latter. In *Faikney v. Reynous*, 4 *Burr.* 2069, it was held that the Plaintiff was entitled to recover upon a bond given to secure the repayment of money advanced by him to settle stock-jobbing differences, on the ground of the advancement of the money being collateral to the illegal concern. In *Petrie v. Hannay*, 3 *Term Rep.* 418. Mr. Justice Buller observes, "there is a wide difference between partners engaged in legal and illegal contracts; in the former if one of the partners pay the whole of a partnership debt without any express promise from

Money paid by one of two partners for the other on account of losses incurred by them on partnership insurances, cannot be recovered in an action brought by him against the other partner. And if this with other causes of dispute between the two be referred to an arbitrator who awards a sum due from one to the other for money so paid, the Court will set aside that part of the award.

(a) *Sullivan v. Greaves*, *Park. Insur.* 8.

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the other, the law gives him a right to recover it back in an action for money paid to the use of that other partner, and it proceeds on this ground, that both are liable to pay: but in the case of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent; in such cases it is necessary to have the consent and direction of that other." Now in this case both parties being compellable to pay the money, either of them had a right to advance the whole, and to call upon the other to repay a moiety, upon the same principle that a partner in a legal partnership may do the same, namely that the payment is not voluntary. In *Watts v. Brook*, 3 Ves. jun. 312. the Master having been directed to take an account in a partnership concern, and having included money advanced on transactions similar to the present, exceptions were taken to that account, but the Lord Chancellor ordered it to stand.

Shepherd, Lens, and Bayley Serjts. contra. If one partner in an illegal concern, make a payment for the other at his express desire, such a payment may be considered as made for the use of the latter: but if a moiety of the money paid by one partner in the course of an illegal concern, without such express desire, may be recovered as money paid to the use of the other, the statutes prohibiting illegal partnerships are altogether nugatory. The cases of *Faikney v. Reynous* and *Petric v. Hannay* have been considerably impeached by *Steers v. Laskley*, 6 Term Rep. 61. and *Mitchell v. Cockburne*, 2 H. Bl. 379. At any rate this case does not fall within the principle of *Faikney v. Reynous* and *Petric* and *Hannay*, of which *Eyre Ch. J.* in *Mitchell v. Cockburne* observes, that they were one step removed from the illegal contract itself and did not arise immediately out of it: and indeed his Lordship adds, that perhaps it would have been better if those cases had been decided otherwise, for when the principle of a case is doubtful he thought it better to overrule it at once than build upon it at all. The cases of *Sullivan v. Greaves*, *Park. Insur.* 8. and *Booth v. Hodgson*, 6 Term Rep. 405. are strong authorities to shew that money paid or received on account of partnership insurances cannot be recovered.

Lord ELDON Ch. J.—This case coming before the Court on a point expressly reserved for their opinion by the arbitrator, we are not called upon to unravel the facts on which he has come to a determination either one way or the other, but to form a determination on the facts submitted to our judgment. Some of the
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cases on this subject, especially that of *Petrie v. Hannay*, have proceeded on a distinction the soundness of which I very much doubt. It has been said, that if one partner in an illegal partnership concern pay money for the other without his authority, that money cannot be recovered; but if the money be paid with his authority it may be recovered. It seems to me however, that if two persons engage in partnership in an illegal concern, each of them gives an authority to the other to transact all that business relating to the partnership without transacting which no profit can ever arise from the concern. In *Sullivan v. Greaves*, a third person undertook to bear half the Plaintiff's risk in an insurance; the Plaintiff therefore underwrote for the joint use of both, and the agreement amounted to an implied authority to the Plaintiff in case of a loss to pay the whole. Indeed if it were otherwise, the partnership must have been put an end to the moment occasion arose for the first transaction in it. The consequence therefore seems to be this, that if a partnership be legal the law raises an implied consent, and if it be illegal, yet if the payment be made in the course of the partnership business, a jury will be warranted in finding an implied consent to that payment without which the partnership could not subsist an instant. Lord *Kenyon* does not appear to have taken any distinction between an express and an implied promise in *Sullivan v. Greaves*; his words are "here the Plaintiff is himself the underwriter who comes to enforce an illegal contract; it is a partnership *pro hac vice* and this party cannot apply to a court of justice to enforce a contract founded in a breach of the law." So in *Mitchell v. Cockburne*, Lord Chief Justice *Eyre* speaking of this sort of partnership, says "no contract can arise directly out of such a proceeding so as to be the foundation of an action" His Lordship reasons on the cases of *Faikney v. Reynolds* and *Petrie v. Hannay*, observing that "they were one step removed from the illegal contract itself, and did not arise immediately out of it" and adds "perhaps it would have been better if they had been decided otherwise." Indeed it seems to me that if the principle of those cases is to be supported, the Act of Parliament will be of very little use. My Brother *Heatb* in that case agreed with the Lord Chief Justice; and I do not understand him to have said more of *Petrie v. Hannay*, than, that if right it proceeded upon a principle not applicable to the case before him: not that the principle itself was right. In *Booth v. Hodgson* which was another case of an insurance partnership, one of the partners and a stranger acted as

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brokers, and having received the premiums were sued by the other partners for their shares. Now there, it might have been insisted, that the premiums being received by the consent of the other partners, the parties receiving were liable to account for them; but the Court held otherwise. In addition to this, the cases of *Steers v. Lashley* and *Brown v. Turner*, 7 Term Rep. 630. stand in opposition to *Petrie v. Hannay*, *Faikney v. Reynous*, and *Watts v. Brook*. With respect to *Petrie v. Hannay* very great weight is due to the opinion of Lord *Kenyon*, who dissented from the rest of the Court. It is unnecessary to give a decided opinion on the determination in *Faikney v. Reynous*, since the circumstance of a specialty given to secure the money advanced, and which was there considered as amounting to a new contract, does not exist in this case. And as to the case in *Chancery* it may be observed, that it is possible that where parties have settled the balance of a mixed account between them of long standing, and one party has had an advantage for many years of credit being given to him for certain sums therein, a Court of Equity may feel itself called upon in justice to open the whole account, if the party who has already had credit for those sums think proper to object to an account being taken of the residue. But if that is to be considered as a case in which it was dryly decided that if a Master in the course of taking an account find certain sums paid on account of any of these illegal transactions he may, on the ground of consent to such payment, view them in the same light as the other *items* of the account, it does not appear to me that the case proceeds upon a principle sufficiently consistent with the Act of Parliament to justify the adoption of it.

HEATH J.—I am of the same opinion as my Lord, who has so fully gone through the cases, that I shall only hint at them. I take it to be by no means settled that if one partner in an illegal concern pay money for the other with his consent, the money so paid can be recovered. There are great authorities and opinions both ways, and we are therefore at liberty to decide upon principles. If the concern in which the money is advanced be *malum in se*, it will not be disputed that it cannot be recovered. For if two agree to assassinate a person and hire a third to do it, and one of the two former pay the whole reward, it is clear that he cannot maintain an action for a moiety. Now I do not see any sound distinction between the case of money paid in a concern which is *malum in se* and money paid in a concern which is *malum prohibitum*.

prohibitum. The latter as well as the former tends to encourage a breach of the law. With respect to what was said by me in *Mitchell v. Cockburne*, though I observed, that it was distinguishable from the cases in *Burrow* and in the *Term Reports*, it is not a fair inference that I meant to approve of the latter cases. Many Judges have avoided giving extrajudicial opinions, and had I given an express opinion on those cases it would have been extrajudicial.

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ROOKE J.—I perfectly agree with my Brother *Heath* in reprobating any distinction between *malum prohibitum* and *malum in se*, and consider it as pregnant with mischief. Every moral man is as much bound to obey the civil law of the land as the law of nature. With respect to this transaction, I do not mean to give any opinion how far the Court would have been called upon to set aside this award upon an affidavit stating the special circumstances, had nothing appeared upon the face of the award itself. But in this case the arbitrator has stated all the circumstances of the case specially for our opinion. Then the question is, Whether as the arbitrator has asked for our opinion, we are not bound by the authority of *Mitchell v. Cockburne* to say that the latter part of the award must be set aside? I think we are.

CHAMBRE J.—I have no doubt upon the case. The question for us to decide is not, whether we shall open transactions closed by a general award which is apparently good; since the whole case arises on inspection of the award itself, and is therefore in the nature of a case reserved for special verdict. There is no doubt that an arbitrator is bound by the rules of law like every other Judge, and if it appear on the face of the award that the arbitrator has acted contrary to law, his award must be set aside. In this case the Plaintiff wants to avail himself of an agreement entered into contrary to law, and calls upon us to enforce that agreement. To shew that it is contrary to law *Booth v. Hodgson* is a very strong authority. In that case the Court refused to assist a partner in an illegal concern in recovering money paid to his partner in the course of the concern, and which he was unconscientiously endeavouring to keep in his own pocket. The cases of *Faikney v. Reynous* and *Petrie v. Hannay* were there very much doubted. I think we cannot do otherwise in this case than decide the question submitted to us according to law, and therefore that so much of the award as is founded on this illegal partnership must be set aside.

Accordingly *The Court* set aside the latter part of the award.

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Feb. 11th.

DA COSTA v. CLARKE.

If an Avowant in replevin after trial and verdict for the Plaintiff obtain judgment *non obstante verdicto* in consequence of the Plaintiff's pleas in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the pleas in bar, because he should have demurred to them.

THE Prothonotary in this case (*ante*, p. 257.) not having allowed to the avowant any costs upon the pleadings subsequent to the pleas in bar, nor any costs of the trial, *Marshall* Serjt. obtained a rule to shew cause why he should not be directed to review his taxation, and allow to the avowant the costs upon all the pleadings;

Shepherd and *Bayley* Serjts. now shewed cause, and contended that the statute of 21 H. 8. c. 19. §. 3. which gives costs to an avowant, does not contain any expressions to prevent the Court from regulating the costs to be allowed according to the general rules which have prevailed respecting costs in other cases; that as all the pleadings subsequent to the pleas in bar had been occasioned by the default of the avowant, who might have obtained judgment at that stage of the cause by demurring, it was not just that he should receive the costs of those pleadings; that the case of a repleader was very analogous to the present, in which case no costs are allowed to either party upon the pleadings subsequent to the point at which the fault is made; and that the case of *Kirk v. Nowill*, 1 Term Rep. 266. was in point, where the Defendant in trespass having pleaded several pleas on which issues were joined, a verdict was given for the Plaintiff on all the issues but one, and for the Defendant upon that one; but the plea on which the Defendant succeeded being shewn to be bad, and the Plaintiff obtaining judgment *non obstante verdicto*, the Court of King's Bench held that the Plaintiff was not entitled to any costs of the issue on the Defendant's bad plea (a).

Marshall Serjt. in support of the rule admitted that the avowant was not entitled to the costs of the trial, but contended that as he had judgment on the whole record, he ought to have the costs of all the pleadings; that the statute of 21 H. 8. expressly directed that if the avowry, cognizance, or justification be found for the avowant, or the Plaintiff be nonsuit or otherwise barred, he shall recover his damages and costs in the same manner as the Plaintiff would have done if he had recovered; that it might often be ad-

(a) *Bayley* Serjt. was about to contend that the Plaintiff was entitled to the costs of the issue on *non cepit* under the stat. 4 Ann. c. 16. but as that point could not be brought under discussion by the present rule, nothing was said on that head.

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viseable for an avowant to take issue and proceed to trial rather than demur to a doubtful plea; and that if he failed by any accident at the trial, and afterwards succeeded by resorting to any fault in the pleadings, he ought not to be prevented from recovering those costs to which the justice of the whole case entitled him. He observed that the case of *Kirk v. Nowill* differed materially from the present, inasmuch as the Plaintiff in trespass is only entitled by the words of the statute of *Gloucester* to the costs of his writ, and whatever more he receives proceeds from the equitable construction put upon that statute by the Court; besides, as the opinion of *Buller J.* in that case was founded on the supposition that other cases had been decided against the Plaintiff, and no such cases are to be found, the authority of that opinion is less to be relied on; whereas the case of *Broadbent v. Wilks, Barnes, 266.* is directly contrary to *Kirk v. Nowill*. He added, that at all events the Court would rather abide by the decision of the former case which had settled the practice of this Court, than adopt that of the latter, by which the practice of the King's Bench was regulated.

LORD ELDON Ch. J.—This case has been put upon two grounds; 1st, the justice of the case, 2dly, the stat. of *H. 8.* With respect to the first, though it may often be prudent for a party to overlook a fault in the pleadings and proceed to trial, yet it appears to me that the advantage which he derives from that mode of proceeding is a sufficient compensation for his being deprived of the costs of the pleadings subsequent to that fault. Certainly he may be said to have been to blame by contributing to the costs of those pleadings, though he ultimately succeed. If however by the necessary construction of the statute of *H. 8.* the avowant be entitled to the costs of all the pleadings whatever the moral justice of the case may be, the Court cannot refuse to allow them. But the next question is whether that be the necessary construction of the statute? In the case of *Kirk v. Nowill* we find the authority of Mr. Justice *Buller* (and a very considerable authority it is on such a point) for saying that a plaintiff in trespass under similar circumstances is not entitled to all the costs. In that case he alludes to cases lately decided, and though we do not find any such decisions in print, we have no reason to conclude that they were not treasured up in the mind of the learned judge. In deciding *Kirk v. Nowill* he proceeded on these principles, which he seems to have considered as the principles of the former cases, *viz.* that the Plaintiff had contributed

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to the costs as well as the Defendant, that he should have demurred to the Defendant's plea, and that by going on to trial he was equally in fault. With respect to the difference between the statute of *Gloucester* and the statute of *H. 8.* as the Courts have decided that the words "costs of the writ" mean costs of the action, the statute of *Gloucester* must be considered as if the latter words had been used, and then all the cases decided upon that statute will become direct authorities in cases arising on the statute of *H. 8.* The case of *Broadbent v. Wilks* is then relied on; if that had been followed up by long, invariable, and known usage, the Court would have been bound to enforce that usage at least *pro hac vice*; but as it is not even pretended that any rule has been brought into familiar practice in consequence of that decision, I think we are at liberty notwithstanding that case to adopt the rule which was laid down in the King's Bench in *Kirk v. Nowill*, and which appears to me most conformable to justice and to the fair construction of the statute of *H. 8.*

HEATH J.—I am of the same opinion. It appears to me that this application is not founded either in reason or justice; that it is not supported by precedent, or conformable to the true construction of the statute. As to reason and justice, if the avowant will not take advantage of a fault in the Plaintiff's pleadings when he has the opportunity of so doing, he becomes *particeps criminis*. The statute of *Gloucester* gives to a plaintiff the costs of his writ; and the statute of *H. 8.* puts an avowant in the same condition as a Plaintiff would be in by the statute of *Gloucester*. Both statutes were made in *pari materia*: the avowant therefore under the statute of *H. 8.* is to recover such costs as a Plaintiff in a common action would recover under the statute of *Gloucester*. With respect to the authority relied on by the avowant, there are many cases in *Earnes* which are not law: and whether the mistake in this instance arose from the decision of the Court, or the inaccuracy of the reporter, still a single decision is not entitled to great weight when opposed by the authority of another determination in the King's Bench, and when it stands in contradiction to reason and justice and the fair construction of the statute.

ROOKE J.—I am of the same opinion. The Avowant in this case derives sufficient advantage from the statute of *H. 8.*; for if we were at liberty to follow our own inclination, so far from giving him these costs, we should direct him to pay them to the Plaintiff.

Plaintiff. He has taken two issues, neither of which he ought to have taken; and all the costs of the trial have been occasioned by his default. That statute was not intended to give costs to an avowant in replevin in a different manner from what they are given by other statutes respecting other actions. When costs are taxed under this statute it must be done subject to the same regulations as in other cases, in which the costs of superfluous counts and similar proceedings are deducted. Then by what better rule of discretion can we proceed than that which has been adopted in the case of a replader? If a party go to trial upon an immaterial issue, the Court must go back to the first fault upon the pleadings, and award a replader; in which case no costs are paid by either side upon the pleadings subsequent to the fault. In this case the Plaintiff by the plea in bar has confessed the matter of the avowry and the avowant if he had adopted the proper means might have obtained judgment on the confession, without the expence of the subsequent proceedings. The case of *Broadbent v. Wilks* is certainly an authority for the avowant: but we are to consider whether we can accede to the propriety of that decision. It stands opposed to the authority of *Kirk v. Nowill* which though it relate to an action of trespass is not to be distinguished from it: and it appears to me that the latter determination is most conformable to the true principles of the law.

Rule discharged without costs.

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SPARKES v. SIMPSON.

Feb. 12th.

IN this case a rule to plead in four days was entered on the 24th of January, and a plea demanded thereon on the 30th of the same month at a quarter before four in the afternoon; on the 31st of January at two o'clock in the afternoon a demand, in writing, of *oyer* of the bond on which the declaration was founded was served on the Plaintiff's attorney, who without granting *oyer* signed judgment on the same day. A rule *nisi* for setting aside this judgment having been obtained,

Oyer may be prayed at any time before the expiration of 24 hours after the demand of a plea, though the rule to plead be out.

Best Serjt. shewed cause and urged, that where *oyer* is not demanded until the time for pleading is expired, the Plaintiff is entitled to treat the demand as a mere nullity, and referred to *1 Sellon Pr. 263. ed. 2.* and the authorities there cited. He ob-

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served that though the rule be otherwise where further time to plead is obtained from a Judge, yet in this case as no time had been obtained the time for pleading expired before the demand of *oyer* was made.

Lens Serjt. *contra* admitted that *oyer* must be demanded before the time for pleading is out, but insisted that notwithstanding the expiration of the rule the Defendant has twenty-four hours after the demand of the plea, and that as *oyer* had been demanded in this case within twenty-four hours after the demand of a plea, the Plaintiff was not entitled to sign judgment without granting *oyer*.

The Court were of this opinion, and relied on the case of *The Duke of Leeds v. Ververs*, Barnes, 268. ed. 3.

Rule absolute.

THE END OF HILARY TERM.

During the Vacation the Great Seal was, on the resignation of Lord LOUGHBOROUGH, delivered to Lord ELDON Lord Chief Justice of the Court of *Common Pleas*, who was appointed Lord High Chancellor of *Great Britain*. His Lordship however continued to hold the situation of Lord Chief Justice of the Court of *Common Pleas*.

Sir JOHN MITFORD Knt. His Majesty's Attorney General, resigned his office at the latter end of *Hilary* Term, and was elected Speaker of the House of Commons.

EDWARD LAW Esq. one of His Majesty's Counsel learned in the law, was appointed Attorney General, and was knighted.

Sir WILLIAM GRANT Knt. His Majesty's Solicitor General, resigned his Office, and was succeeded by

The Honorable SPENCER PERCEVAL, one of His Majesty's Counsel learned in the law.



C A S E S

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ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Easter Term,.

In the Forty-first Year of the Reign of GEORGE III.

SCURRY *qui tam* v. FREEMAN.

April 23d.

DEBT on the statute of Usury.

The cause was tried before *Chambre J.* at the Guildhall Sittings after *Hilary* Term, when the facts in evidence were as follow:—In *September* 1794 the Defendant lent the sum of 500*l.* to one *Robert Hooley* upon his bond, and an assignment by way of mortgage of certain leasehold premises. At the time of the loan it was understood that *Hooley* was to give something more than legal interest as a compensation, but no particular sum was agreed upon. After the securities were executed and the money advanced the parties went together to another place where *Hooley* offered the Defendant 50*l.*, who directed him to give it to his son then present; which was accordingly done. Interest at the rate of 5*l.*

A. lent *B.* 500*l.*, and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed *B.* gave *A.* 50*l.*

and paid interest at the rate of 5*l. per cent.* on the 500*l.* for five years; at the end of which time an action was brought against *A.* for usury.—Held that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.* and consequently the interest at the rate of 5*l. per cent.* on the 500*l.* received within the last year was usurious. If a draft be given for usurious interest and a receipt taken for it in the county of *A.*, and the draft be afterwards exchanged for money in the county of *B.*; the usury is committed in the county of *B.*, and the *venue* must be laid there.

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per cent. was paid on 500*l.* until the 19th of *January* 1797, when the securities were changed and new deeds given to secure the 500*l.* and 5 *per cent.* interest, which was paid from time to time up to the 26th *December* 1799. On the last mentioned day 25*l.* was paid to the Defendant as one year's interest on 500*l.* by a draft on a banker, which draft was received as cash and a receipt accordingly given for it by the Defendant at a house in *Bedford-Row* in the county of *Middlesex*, but which was afterwards exchanged for money by him with a third person in *West Smithfield London*. The *venue* was laid in *London*. At the trial it was contended on behalf of the Defendant, 1st, That as the crime of usury, so as to subject the party committing it to penalties, is complete on the taking of the usurious interest, the crime of usury was in this case complete on the receipt of the 50*l.* given by way of compensation for the loan in *September* 1794 (a), and consequently the time was long since expired within which this action should have been brought; for that since that time nothing more than 5*l. per cent.* had been received on the 500*l.*; 2dly, That the *venue* was improperly laid in *London*, for supposing the receipt of the last 25*l.* as one year's interest to be deemed usurious, still it was received in *Bedford-Row*, which is in *Middlesex*. The Jury under the direction of the learned Judge found a verdict for the Plaintiff.

Best, Serjt. now moved to have a nonsuit entered, relying on the objections taken at the trial, and in support of the first referred to *Lloyd qui tam. v. Williams*, 3 *Wils.* 250. and *Fisher qui tam v. Beasley*, *Dougl.* 235.

But *The Court* (consisting of *Heath*, *Rooke*, and *Chandler*, Judges) were very clearly of opinion, that the receipt of 25*l.* as one year's interest was usurious, inasmuch as the loan could only be deemed a loan of 450*l.* since the Defendant had taken back 50*l.* out of the 500*l.*; and also that the draft on the banker was merely a promise to pay, whereas the actual receipt of the money constituting the usury took place in *Smithfield*, which was in *London* (b).

Best took nothing by his motion.

(a) On a contract to forbear 600*l.* for a year, reserving interest at the rate of 5*l. per cent.*, if a premium be taken at the time of the loan, the crime of usury is complete the instant any part of the growing interest is received by the lender. *Wade q. t. v. Wilfon*, 1 *Easf.* 195.

(b) If an usurious contract be entered into by a deed executed in *London* appointing

A. the lender to be receiver of *B.* the borrower's rents in *Middlesex*, with a pretended salary, and *A.* receive the rents in *Middlesex*, but settle for the balance with *B.* in *London*, the *venue* in an action on the statute, be well laid in *London*. *Scott q. t. v. Brest*, 2 *Term Rep.* 238. Indeed it seems that it might be laid either in *London* or *Middlesex*, per *Fishburn J.* *Ib.* 240.

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CASTLEMAN, Executor of CASTLEMAN v. RAY, Ex- April. 24th.
ccutor of RAY.

INDEBITATUS assumpsit for money had and received and on an account stated. The Defendant pleaded a tender as to part and a set-off as to the rest.

At the trial of this cause at the Guildhall Sittings after last *Hilary* Term before *Chambre J.*, the Defendant in order to support his plea of set-off tendered in evidence an unstamped paper of which the following is a copy—

“ Mr. *Castleman*

Please to pay the bearer 30*l.* 8*s.*; his receipt will be your discharge, from

Yours, &c.

Standgate, Sep. 3, 1790.

THO. MOSELEY.

Mr. *Castleman*, Bricklayer,
Camberwell.

Paid by *Rich^d. Ray*
for *Charles Castleman*.”

The words “Paid by *Rich^d. Ray*” were in the hand-writing of the Defendant’s testator, and the words “for *Charles Castleman*” in the hand-writing of the Plaintiff’s testator. It was objected that this paper not being stamped could not be received in evidence, being a draft or order within the meaning of 23 *Geo. 3. c. 49. s. 2.* (which act was in force at the time the draft was drawn) and not falling within the exception in *s. 4.* of that act which exempts every draft or order for the payment of money on demand upon any banker or person or persons acting as a banker residing or transacting the business of a banker within ten miles of the place of abode of the person or persons drawing such draft or order, from being stamped. The learned Judge being of that opinion, refused to receive the paper in evidence, and a verdict was found for the Plaintiff.

Runnington Serjt. now moved for a rule calling on the Plaintiff to shew cause why a new trial should not be had, contending 1st, That *Castleman* upon whom the draft was drawn, though not a banker by business, might be considered as a person acting as a banker within the meaning of the act, having been treated by the drawer as such; 2^{dly}, Admitting that the paper could not be

An unstamped draft drawn on “*A. B. bricklayer*” is not within the exception of 23 *Geo. 3. c. 49. s. 4.* in favour of drafts drawn on persons acting as bankers within 10 miles of the place where the draft is drawn. If at the bottom of such a draft there be an acknowledgment of the drawee that a third person paid it for him, that acknowledgment cannot be received in evidence.

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received in evidence as a draft, yet that as *Castleman* had acknowledged at the bottom of it, under his own hand, that *Ray* had paid the money mentioned in the paper for his use, the Defendant ought not to be precluded from giving that acknowledgment in evidence merely because it stood on the same paper as the draft; that the acknowledgment if written on a separate piece of paper would not have required a stamp since it was not in the nature of a receipt. *Fisher v. Leslie, Esp. N. P. Cas* 426.

But *The Court* (consisting of *Heath, Rooke, and Chambre* Judges) were of opinion, that the evidence was properly rejected, for that the acknowledgment of *Castleman* could not be made available without giving effect to the draft.

Runnington took nothing by his motion.

April 24th.

ON SLOW, Demandant v. SMITH, Tenant.

Aid-prayer is a dilatory plea within 4 Ann. c. 16. and must be verified by affidavit. If the tenant in a writ of right pray aid after a general imparlance it is good cause of demurrer: and the Court will give judgment thereupon that the tenant answer alone.

THIS was a writ of right brought to recover a piece of garden ground and curtilage, with the appurtenances, in the borough of *Horsham*.

The Demandant counted in *Easter Term* 1800, and laid the right and seisin within sixty years by taking the esplees in his father *Denzill Onslow* from whom the right descended to himself. The tenant obtained three general imparlances, 1st, To the Morrow of the *Holy Trinity*, 2dly, To the Morrow of *All Souls*, and 3dly, Till Eight Days of *Saint Hilary*. "At which day the Demandant cometh here into Court by his said attorney, and the tenant by his attorney aforesaid, and the said tenant says, that long before the day of suing out the original writ of the said Demandant, the Right Honourable *Charles* Lord Viscount *Irwin* of the kingdom of *Scotland* was seised of the tenement aforesaid with the appurtenances in his demesne as of fee, and being so seised on, &c. made his last will and testament; (Here the tenant set out the limitations in the above will, by which a title was derived to *Lady Irwin* for her life, remainder to Lord *Irwin's* daughter *Isabella Ann* Lady *Beauchamp* for her life, remainder to the second third and other sons of Lady *Beauchamp* in tail male, remainder to his daughter *Frances* for her life, remainder to her first and other sons in tail male, remainder to his daughter *Elizabeth* for her life, remainder to her first and other sons in tail male, with several

other remainders over; the tenant then averred the death of Lord *Irwin*, whereby Lady *Irwin* became seised for her life, and that she by lease and release of the 28th and 29th of *May* 1790, conveyed her life interest to the tenant; and that Lady *Beauchamp* had no second son, and *Frances* no son.) And the said tenant further says that the said *Elizabeth* afterwards and before the suing out of the said original writ of the said Demandant, at the borough of *Horsham* aforesaid intermarried with one *Hugo Meynell* Esquire, and the said *Hugo Meynell* and *Elizabeth* have issue between them lawfully begotten one *Hugo Meynell* their first son who is now living, to whom and to the heirs male of his body issuing, the tenement aforesaid with the appurtenances after the death of the said Viscountess, and after the respective deaths of the said *Isabella Ann*, *Frances*, and *Elizabeth*, and in default of such issue of their respective bodies as aforesaid doth belong and without which said *Hugo Meynell* the son, the said tenant cannot draw into plea the aforesaid tenement with the appurtenances nor answer the said Demandant thereof, wherefore he prays aid of the said *Hugo Meynell* the son."

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"And the said Demandant protesting that the said *Charles* Lord Viscount *Irwin* of the kingdom of *Scotland* was not so seised of the tenement aforesaid with the appurtenances as the said tenant hath above supposed, says, that the matters alleged by the said tenant in manner and form as the same are above stated and set forth, are not sufficient in law for the said tenant to have aid of the said *Hugo Meynell* the son, wherefore he prays judgment, and that the said tenant may answer the said Demandant in the plea aforesaid without the aid of the said *Hugo Meynell*. And for causes of demurrer in law the said Demandant sets down and shews to the Court here the following that is to say, for that the said tenant hath prayed the aid of the said *Hugo Meynell* the son, in a term subsequent to that in which the said Demandant counted against the said tenant, and after an imparlance had been prayed by and granted to him; and also for that the said tenant hath not made any *profert* of the said several indentures which he hath alleged to have been respectively made on the 28th and 29th days of *May* in the year of our Lord 1790 aforesaid, or of either of such indentures, nor hath he set forth any legal excuse for not shewing the same or either them to the Court here; and for that the said aid-prayer is in various other respects uncertain, insufficient, and informal."

"And

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" And the said tenant says that the matters and things by him alleged in manner and form as the same are above stated and set forth, are sufficient in law for him the said tenant to have aid of the said *Hugh Meynell* the son, and this he is ready to verify and prove as the Court, &c. And because the said Demandant hath not made any answer to the said aid-prayer, nor hitherto denied the same, the said tenant prays judgment, and also as before prays aid of the said *Hugo Meynell* the son."

This case was to have been argued last *Michaelmas* Term by *Best* Serjt. in support of the demurrer, and *Bayley* Serjt. *contra*;

But *The Court* being of opinion that the aid-prayer was a dilatory plea within the statute of *Ann*, and indeed the most dilatory which could be pleaded, since an infant in arms might be prayed in aid and the parol would demur till he came of age, observed that it must be verified by affidavit.

Best then insisted, that as the tenant had omitted to verify by affidavit, the Court would not then give him time to do so, but would give judgment on the demurrer that the tenant should answer to the Demandant without aid.

But *The Court* answered that no such judgment could be given until default after default; that the course which the tenant ought to follow was to sue out a writ of summons *ad jungendum auxilium*, and that if the prayee then made two defaults judgment might be given that the tenant should answer without him. They therefore gave leave to the tenant to verify his plea by affidavit, saying at the same time that the Demandant was at liberty to withdraw his demurrer.

The tenant accordingly verified his aid-prayer by affidavit; but the Demandant not having withdrawn his demurrer, it now came on to be argued;

Best Serjt. for the Demandant. The first objection to the aid-prayer is, that it has been prayed after a general imparlance, *Booth on Real Actions*, p. 61. Now that an aid-prayer is a dilatory plea need not be argued, since the Court have decided that point, by requiring that it should be verified by affidavit. If indeed it be contended that the consequence of establishing that aid cannot be prayed after a general imparlance would be, that aid so prayed might be treated as a nullity, and could not be demurred to; it may be answered that in *Buddle v. Willson*, 6 Term Rep. 369. which was a demurrer to a plea in abatement pleaded after a

general imparlance, the Court gave judgment of *respondeas ouster* on the demurrer. So in the present case the Court may give judgment that the tenant answer without aid. In fact the tenant for life and the remainder-man may be compared to two joint-tenants, one of whom if sued alone has a right to plead in abatement, but may be deprived of that advantage if he neglect to plead in abatement until after a general imparlance. The second objection is, that no *profert* has been made of the deeds stated in the aid-prayer, under which the tenant derives his title.

[HEATH J.—There is nothing in this last objection: for it is unnecessary to make *profert* of any deed which has its operation under the statute of Uses (a).]

Bayley for the Tenant.—The objection which has been taken to this aid-prayer, that it cannot be pleaded after a general imparlance, is not well founded. The passage referred to in *Booth* 61. is this; “In real actions aid ought to be demanded at the first day the tenant hath to plead, that is before imparlance.” In support of this *Booth* refers to 3 H. 6. 5. which does not support the above proposition. Indeed *Booth* himself in p. 94, speaking of the writ of right patent, says “After the view and imparlance, the tenant may plead or vouch, or pray in aid if he be tenant for life.” And in *Co. Entr.* 48. tit. *Annuities*, pl. 1. there is a precedent in which aid was not only once prayed after a general imparlance, but the prayees after having been joined in aid obtained another general imparlance, and then prayed in aid the reversioner. To grant aid where it ought not to be granted is not error, but to refuse it where it ought to be granted is error. *Bro. Abr.* tit. *Ayde*, pl. 118 (b).

Best in reply.—Precedents of pleading cannot be opposed in point of authority to decided cases, since they are not sanctioned by the judgment of the Court. *Viner*, when considering at what time aid ought to be demanded by the tenant, says “He ought to demand it the first day of the term he begins to plead.” *Vin. Abr.* tit. *Aid of a Common Person*, F. a. and cites 2 H. 6. 5. b. (c);

(a) See the cases on this subject collected by *Williams Serjt.* in his edition of *Saunders, Jevens v. Harridge*, p. 9. a. in *notis*, and also 8 Term Rep. 573. *Banfill v. Leigh and another*, where Lord *Kenyon* mentions a conveyance to uses as an instance in which *profert* need not be pleaded.

(b) See also to the same effect 8 H. 7. 11. *Per Hussy*. And the same rule prevails with respect to *oyer*. 6 Mod. 28. 2 Salk. 498. 2 *Ld. Raym.* 969. *Longueville v. Thistleworth*.

(c) This is mis-printed in *Viner* for 3 H. 6. 5. b.

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and in the next paragraph he adds "If a plea be adjourned from one term to another, in the other term he shall not have it. 3 *H.* 6. 5. *b.*" Now an imparlance is an adjournment. The two passages in *Booth* may be reconciled, by supposing that in one he speaks of a general, and in the other of a special imparlance.

The Court at first inclined to overrule the demurrer, and observed, that the tenant having only a life-estate was bound at the peril of a forfeiture to pray in aid the remainder-man; that in this case therefore the only question was, whether aid had been properly prayed; and that although it might perhaps have been a subject of demurrer, if it had appeared on the face of the aid-prayer that the tenant had no right to demand aid of the prayee, yet it did not follow that the Demandant was entitled to demur on account of a supposed informality in the aid-prayer, since if it were quashed on this demurrer, the interests of the remainder-man would be affected without his being in Court to defend himself, and the tenant could not be adjudged to answer by himself until the prayee had made default after default. *Cur. adv. vult.*

On this day the judgment of the Court (present ROOKE and CHAMBRE Justices) was delivered by

HEATH, J.—The question is, whether after a general imparlance aid-prayer lies? It is a clear principle of law that no dilatory plea can be pleaded in another term after a general imparlance, and it is clear that aid-prayer is a dilatory plea: the law is so laid down, in *Booth* 61. 1 *Rel. Abr.* 185. and *Hard.* 179. On behalf of the tenant, there have been cited as authorities, *Booth* 94. and two precedents in *Coke's Entries*, *fo.* 48. As to the passage in *Booth* it is extremely inaccurate, for it refers to a former passage in the same book, which directly contradicts it, and cites *Coke's Entries*, *fo.* 182. *pl.* 4. where I find that no imparlance whatever was antecedently granted. I have looked into *Coke's Entries*, *fo.* 48. *a.* and 629. *b.* (*a.*). In the first of these *Entries* the imparlance was granted in the same term: the second of these *Entries* is a precedent for the tenant so far as it goes, but I think it is of but little weight, because the granting aid where none is of right demandable is not error. It might be the interest of the Demandant to acquiesce in the demand, inasmuch as it enabled him to obtain a more complete judgment against the tenant for life and remainder-man, instead of obtaining it against the tenant for life only. *Quisque potest renun-*

(a) Tit. *Scire facias*, *pl.* 12.

tiare juri pro se introducto. The distinction is clearly taken by *Martin*, once a justice of this bench, that an indefinite number of aid-prayers may be successively taken after an imparlance in the same term, but the tenant shall not have aid after a general imparlance in another term. 3 *H. 6.* 5. *b.* We are all of opinion, that in this case the demurrer ought to be allowed, and the judgment of the Court is, that the tenant shall answer alone without the aid of *Hugo Meynell* the son (a).

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ON SLOW
v.
SMITH.

(a) There seems to be a distinction between judgments against the tenant upon demurrer to the aid-prayer and judgments against him where the Demandant counterpleads the aid-prayer; in the former case it is not final, in the latter it is. Thus in *Bro. Ab. tit. Peremptory, pl. 76.* it was said by *Seton* "if the tenant prays aid, and the Demandant counterpleads, and the tenant pleads estoppel against the counterplea, which is adjudged against him, this is peremptory; but upon demurrer upon the aid this is not peremptory." So in 2 *Leon* 52. where in a writ of *partitio facienda* the

Defendant prayed in aid, and the Plaintiff counterpleaded, upon which issue was joined and found for the Plaintiff, it was held to be peremptory, and that the judgment should be *non quod respondent sed quod partitio fiat.* In this respect, as in many others, the aid-prayer appears to resemble a plea in abatement; to which if Plaintiff demur and succeed on the demurrer, judgment shall be that Defendant *respondet ouster*; but if issue be taken on the plea, and found against the Defendant, the judgment shall be final. See *Com. Dig. tit. Abatement, I. 14. 15.*

HAMMERSLEY v. MITCHELL.

April 27th.

IN this case the Plaintiff's clerk having made an affidavit of debt to hold the Defendant to bail, in which he had sworn positively to the debt and negatived any tender in bank-notes, in the same way as in *Smith v. Tyson, ante, p. 339.*

Best Serjt. on the authority of the above case obtained a rule *Nisi* for discharging the Defendant on a common appearance.

Shepherd Serjt. now shewed cause, and urged, that notwithstanding the case of *Smith v. Tyson* the Court would probably choose to reconsider the rule they had adopted, inasmuch as the Court of *King's Bench* had since the determination of that case, and with a full knowledge of it, decided (b) differently, and refused to grant such an application as the present, observing that if the principle of that case could be supported it would be necessary for all the partners to join in the affidavit where they were joined in the action.

An affidavit to hold to bail made by Plaintiff's clerk expressly negativing a tender in bank-notes, held bad.

(b) The name of the case was *Madox v. Abercomby*, the application was made by *E. Morris* on facts precisely similar with those of *Smith v. Tyson*, and on the authority of that case in *Hil. 41 Geo. 3.*, and re-

fused by the Court of *K. B.* See also *The Mayor of London v. Dias*, 1 *East*. 239. and *Knight v. Keyte*, 1 *East*. 415. to the same effect.

But

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SLEY

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But *The Court* (consisting of HEATH, ROOKE, and CHAMBRE Justices) adhered to their former opinion; and CHAMBRE J. observed, that it would be difficult to say that the Deponent had not committed perjury, since he had sworn to a fact not within his knowledge.

Rule absolute.

April 27th.

CHATTERLEY v. FINCK.

HOLLINGS v. Same.

A person employed in London as agent to one residing at a distance in the country with a power of attorney to collect his debts, may make an affidavit of debt positively denying any tender in bank-notes.

IN these cases the affidavits to hold to bail were made by one Robert Anderson, agent to the Plaintiffs, and were precisely similar to that in the last case. Accordingly

Vaughan Serjt. obtained a rule *Nisi* for discharging the Defendants on entering common appearances.

Against those rules Best Serjt. now shewed for cause affidavits stating that the Plaintiffs resided at *Stafford*, and that the said Robert Anderson being resident in *London*, was appointed their agent by power of attorney, for the special purpose of obtaining payment of the debts for the recovery of which these actions were brought, and for compounding and settling the same as he should in his discretion think most fit.

The Court (consisting of HEATH, ROOKE, and CHAMBRE, Justices) were of opinion that the facts disclosed in the affidavit now produced, sufficiently accounted for the Plaintiff's agent being able to negative so positively the tender in bank-notes.

Rules discharged.

April 28th.

STACEY and Two others v. FEDERICI.

An affidavit of debt made by one of three partners denying any tender in bank-notes to himself "or to either of his partners to the best of his knowledge and belief," is sufficient.

ONE of the three Plaintiffs, who were partners, having made the affidavit to hold to bail, in which he swore positively to the debt, and expressly negatived any tender in bank-notes having been made to himself, or to either of his partners to the best of his knowledge and belief;

Best Serjt. obtained a rule *Nisi* for cancelling the bail-bond and entering an *exoneretur* on the bail-piece, 1st, because all the Plaintiffs had not joined in the affidavit to hold to bail; and 2dly, on an affidavit stating that a commission of bankrupt had issued against

The Court will not discharge a Defendant on common bail on the ground of his having obtained a certificate as a bankrupt and of the debt being thereby barred, if the validity of the certificate is meant to be disputed.

the Defendant, who had obtained his certificate, and that the debt in question had accrued previous to the issuing of the commission.

Shepherd Serjt. shewed caused and contended, 1st, that as it was not necessary before the passing of the bank-act that all the Plaintiffs should join in an affidavit to hold to bail, it was not the intention of the Legislature to compel them to do so now; 2dly, that it did not appear by the Defendant's affidavit that the debt accrued prior to the act of bankruptcy, without which the certificate would be no bar. *Bamford v. Burrell*, ante, p. 1. He also produced an affidavit, stating that the validity of the certificate was the point intended to be contested at the trial; and urged that the Court would not prejudice that question on a summary application.

The Court (consisting of HEATH, ROOKE, and CHAMBRE Justices) were of opinion, that the affidavit to hold to bail was sufficient; and that though the affidavit upon which the rule was granted was good *prima facie* evidence of the debt having accrued prior to the act of bankruptcy, yet that as the validity of the certificate was disputed they could not interfere in a summary way.

Rule discharged.

The Earl of RADNOR v. REEVE.

April 28th.

TRESPASS for breaking the Plaintiff's house and taking away his goods. Plea Not-guilty.

This action was brought against the Defendant who was collector of the duties on male servants, houses, windows, horses and dogs, for distraining goods in the Plaintiff's house for one year's duty and surcharge on one male servant. The Plaintiff had appealed against the surcharge to a meeting of the Commissioners, on the ground that the male servant in question was a day-labourer. The Commissioners dismissed the appeal (a), and the Defendant in consequence made a distress upon the Plaintiff's goods to satisfy the duty. When this cause came on to be tried before Lord Eldon Ch. J. at the *Westminster* Sittings after last

If the judgment of Commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass.

(a) By 25 G. 3. c. 43. s. 35. the appeal is given; and by s. 38. and 39. declared final unless a case be stated for the opinion of a Judge. By 37 Geo. 3. c. 107. the duties are increased, and the former powers reserved to the Commissioners.

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The Earl of
RADNOR
v.
REEVE.

Michaelmas Term, a verdict was found for the Plaintiff subject to the opinion of this Court upon a case reserved.

The case being now called on for argument, and the Court intimating that it was not open to discussion, inasmuch as they had no jurisdiction, the determination of the Commissioners' being final;

Lens Serjt. endeavoured to obviate that objection by citing *Milward v. Caffin*, 2 Bl. 1330. and *Harrison v. Bullcock*, 1 H. Bl. 68., in the former of which cases the Court of *Common Pleas* had entertained a question respecting a poor-rate which had been confirmed by the Sessions on appeal, and in the latter a question on the land-tax, after an appeal to the Commissioners which had been dismissed, and observed that if the Commissioners in this case had taxed the Plaintiff for a servant not falling within the description of the act they had exceeded their jurisdiction.

But *The Court* (consisting of HEATH, ROOKE and CHAMBRE Justices) said, that it had been determined by all the Judges of *England*, that when a statute provides that the judgment of Commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way.

Judgment for the Defendant (a).

(a) See the words of Yates J. in *Strickland v. Ward*, 7 Term Rep. 634. in notes, "that a conviction of a justice could not be controverted in evidence, that the justice having a competent jurisdiction of the matter his judgment was conclusive till reversed or quashed; and that it could not be set aside at *Nisi Prius*." But where a statute (13 G. 3. c. 78. s. 19.) directed that an order of justices for turning a footway confirmed on appeal to the Quarter Sessions should be final;

and in a subsequent section (s. 63.) provided that certain forms set forth in a schedule should be used on all occasions, and that no objection should be taken for want of form in any such proceedings; it was held that a material variance from the form prescribed was fatal to the order, and might be taken advantage of in an action of trespass, notwithstanding the order had been confirmed on appeal to the Sessions. *Davies v. Gilk*, 1 East. 64.

April 28th.

VAUGHAN v. BARNES.

The Court will not order money paid into Court by the Defendant through a mistake to be restored to him. — Though perhaps in case of fraud they may.

TWO actions having been commenced against the Defendant in this case for goods sold and delivered, one of which was at the suit of the Plaintiff, and the other at the suit of a third person; the Defendant to the first pleaded a tender of 28*l.* 8*s.* and paid the same into Court, which was taken out by the Plaintiff; and to the last he pleaded the general issue, considering that the Plaintiff *Vaughan* was the only person entitled to recover for any

of

of the goods delivered, but that he had demanded more than was actually due. The action to which the general issue only was pleaded coming on to be tried first the Plaintiff obtained a verdict; after which the Defendant procured a bill of particulars from the present Plaintiff, which stated his demand to be 20*l.* 3*s.* Upon this *Best* Serjt. having obtained a rule calling on the Plaintiff to shew cause why the sum of 8*l.* 5*s.* being the difference between the sum paid into Court and that stated in the Plaintiff's particulars should not be refunded to the Defendant, was now called upon to support his rule. He urged that although the Court would not in general order money to be refunded which had been paid into Court by a Defendant, yet that in a case like the present where the Defendant had acted under a complete mistake, and where the Plaintiff's own particulars shewed that his demand did not amount to so much as he had taken out of Court, they would not adhere to a rule which would work injustice.

But *The Court* (consisting of HEATH, ROOKE and CHAMBRE Justices) were of opinion, that the Defendant pays money into Court at his peril, and that the Court would never order it to be restored unless it appeared that some fraud or deceit had been practised upon him; and added, that almost every Defendant pays something more into Court than he believes to be due, that he may be certain of covering the just demand, and that consequently if the Court were to attend to the present application there would be no end to motions of this kind.

Rule discharged (a).

(a) In *Crockey v. Martin, Barnes*, 281. taking money out of Court, the note of the Plaintiff having died before trial, the Defendant moved to have the money paid back to him, but the Court refused the application. See on the general head of

Mr. Serjt. Williams in *Birks v. Tippet*. 1 *Saund.* 33. also *Le Gros v. Cooke*, ante, vol. 1. p. 332. and the notes to that case.

THOMAS v. WARD.

April 29th.

IN this case the writ of *habeas corpus juratorum* was returnable on the 9th day of the month; on the evening of the 12th being the last day of the term final judgment was signed. On this *Best* Serjt. obtained a rule *Nisi* for setting aside the judgment, and now in support of that rule referred to 1 *Sell. Pr. ed.* 1752.

The rule that final judgment cannot be signed till four days after the return of the *habeas corpus*

juratorum does not extend to a case where the term closes before the four days are expired.

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THOMAS

v.
WARD.

p. 496. where it is laid down that four days exclusive from the return of the *habeas corpus* are allowed for any motion in arrest of judgment or for a new trial.

Shepherd Serjt. *contra* was stopped by *The Court* (consisting of HEATH, ROOKE and CHAMBRE Justices) who after enquiry of the officers declared the rule laid down in *Sellon's Practice* not to extend to cases where the term closes before the four days are expired.

Rule discharged.

April 29th.

WILSON *qui tam* v. VAN MILDERT, Clerk.

Where three parish churches have been united by 22 Car. 2. c. 11. the benefice may be described in pleading as one rectory.

THIS was an action for non-residence. The first count in the declaration described the Defendant's benefice as "the parsonage of the rectory and parish church of the united parishes of *St. Mary Le Bow St. Pancras Soaper-Lane* and *Alballows Honey Lane*." The second count described it as "a certain rectory to wit, the rectory of the parish church of the united parishes &c." as in the preceding count.

The cause was tried before Lord ELDON Ch. J. at the Guildhall Sittings after last *Michaelmas* Term, when a verdict was found for the Plaintiff, with liberty to the Defendant to move to enter a nonsuit, on the ground of the benefice being improperly described in the declaration. By the statute of 22 Car. 2. c. 11. s. 63. which was passed for the uniting certain parishes after the fire of London, it is provided that "the parishes of *St. Mary le Bow St. Pancras Soaper-Lane* and *Alballows Honey-Lane* shall be united into one parish and the church heretofore belonging to the said parish of *St. Mary le Bow* shall be the parish church of the said parishes so united." The 68th section also enacts "that notwithstanding such union as aforesaid each and every of the parishes so united as to all rates taxes parochial rights charges and duties and all other privileges liberties and *respects whatsoever* other than what are herein mentioned and specified shall continue and remain distinct and as heretofore they were before the making of this present act, and that the several and respective patrons of the said churches so united shall and may present by turns to that church only which by this act is appointed to be rebuilt and established

established for the parish church of the parishes so united as aforesaid, the first presentment to be made by the patron of such of the said churches the endowments whereof are of the greatest value." In the letters of institution the Defendant was described as "rector of the rectory and parish church of *St. Mary le Bow* with the rectories of *St. Pancras Soaper-Lane* and *Alballow-Honey-Lane* thereunto annexed."

1801.
WILSON
V. VAN MILDERT.

A rule *Nisi* for setting aside the verdict and entering a nonsuit having been obtained in the course of last term,

Bayley Serjt. now shewed cause. The question is, Whether the Plaintiff has done right in describing the Defendant's benefice as one rectory? In *Spelman's Glossary* *Rectoria* is put *pro integrâ ecclesiâ parochiali cum omnibus suis juribus pratis decimis aliisque proventuum specibus; aliâs vulgò dictum beneficium*. The rectory and benefice therefore are considered as synonymous. In 1 *Bl. Com.* 384. it is said "that a parson is one that hath full possession of all the rights of a *parochial* church and that he is sometimes called the rector or governor of the church." The rectory therefore means that over which the parson of the church is rector, and if there be but one parish there can be but one rectory. It is true that before the statute of *Car. 2.* there were three rectories, but the effect of that statute was to make a union of the three and convert them into one. Previous to the statute there were three churches, but by the statute the churches are united; there is now but one church, one benefice, one advowson, and therefore there can be but one rectory. It appears from the opinion of *Powell J.* in *Reynoldson v. Blake*, 1 *Ld. Raym.* 196. that after a union at common law there is but one church, and one benefice and one advowson. To the same effect is *Dyer* 269. b. and *Cro. Car.* 987. In the case of *The Grocer's Company v. The Archbishop of Canterbury*, 3 *Wils.* 214 which related to the very parishes mentioned in this declaration, they were described in the pleadings as one rectory. And it appears from the case of *St. Swithin v. St. Mary Botbaw*, *Skin.* 588 and 616. that under a union by the statute of *Charles the Second*, not only the churches but the parishes are united.

Shepherd and *Best* Serjts. in support of the rule. The 68th section of the act provides, that the parishes therein mentioned shall continue distinct in all respects whatsoever except in those which are expressly mentioned; and as it is not declared in any part of the act that the rectories of the several parishes in question shall be united they must still be considered as three separate rectories.

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WILSON
v.
VAN MIL-
DERT.

If the argument used for the Plaintiff were found, it would follow that a rectory and a vicarage in two parishes united by the act, would also be united, and that the latter would be swallowed up by the former; but it is clear from the case of *Reynoldson v. Blake*, that if there be a rectory in one of the two parishes united under the act and only a vicarage in the other, that the rectory and vicarage continue distinct notwithstanding the union of the parishes. The statute 4 *W. & M. c. 12.* plainly shews, that parishes after the union of the churches remain distinct, except for the purposes specified in the act of union; since if they were united, to all intents that act which obliges all the parishes to contribute to the repairs of the church would not have been necessary. So in the Building Act 14 *Geo. 3. c. 78. s. 79.* it is expressly declared, that whereas several parishes were united together after the fire of London “any two or more of the said parishes so united shall for the purpose of this act be deemed one parish only.” The letters of institution afford strong evidence of the sense which has been put upon the statute of *Car. 2.*

Cur adv. vult.

On this day the judgment of the Court (present ROOKE and CHAMBRE Justices) was delivered by

HEATH J.—The question is, Whether the Plaintiff in his declaration has well described the Defendant's benefice in respect of which he has sued him for non-residence? In all the counts in this declaration the benefice is stated to consist of one rectory. It is contended by the Defendant, that it consists of three rectories united together, and which notwithstanding their union still exist. The union of these parishes is by the statute 22 *Car. 2.* whereby it was enacted, that the parish church of *St. Mary le Bow* should be alone rebuilt and should be the parish church of the parishes so united. By section 68. it is provided, that the presentation shall be to that church only which is to be rebuilt. It appears in evidence that the Defendant was admitted to the parish church of *St. Mary le Bow*, with the churches of *St. Pancras* and *Albhallows* thereunto annexed. The Defendant's counsel have greatly relied on the terms of this institution and admission to prove their point. In my apprehension the description of the Defendant's benefice is substantially the same in the counts of the declaration as in the institution and admission. The word “annexed” is synonymous with united. In *Rastall's Entries, fol. 522 (a).* we

(a) *Tit. Quare Impedit, pl. 6.* In the edition of 1566 this entry is to be found *fol. 479. b.*

find these words, *Idem J. B. prætextu unionis annexationis incorporationis et consolidationis solus persona prædictæ integre ecclesiæ tunc extitit.* We must consider the operation of law on the union: true it is, that there are still three distinct patrons but there is one incumbent. By the union the patronage is preserved, but the incumbency of two of the benefices is destroyed; it is the incumbency and not the rectory which is the subject of the suit, and if that be well described the Plaintiff may maintain his action. What is said by *Powell J.* in *Id. Raym.* 196. is material, *viz.* that in case of united churches, there is but one advowson in right, and that every patron has the whole advowson in his turn. Consequently there is but one rector and one rectory: if these were three distinct rectories the incumbent could not hold them even with dispensation. It is material to consider the pleadings in the case of union. In 11 *H. 6.* 33. the law is laid down by *Babbington Ch. J.* If a consolidation be made of two churches and an abbot hath an annuity out of the church consolidated to another, if the annuity be in arrear and the abbot brings his writ of annuity, he must name the parson of the church to which the church is consolidated. In the case of *Reynoldson v. Blake* and *The Bishop of London*, the Plaintiff brought *Quare impedit* for hindering him from presenting to the church of *St. Andrew's Wardrobe* in London only, and in his declaration he states the union of that church with the church of *St. Anne Blackfriars*, and he claims to present as patron of *St. Anne Blackfriars*. The pleadings are in *Levinz Entries* 141; and that was a union of a vicarage and a rectory, and the presentation though in right of the vicarage was only to the church. The presentations to these united churches have been the same as in the present instance, as appears by the case cited from 3 *Wilson* 214. From these instances it may be inferred, that the presentation in case of union may be either way, and that this is a proper description. Much reliance has been had on the 68th section of the act, which reserves to the several parishes their distinct rights. Nothing can be inferred from thence in respect to the incumbency. It was a cautious proviso, perhaps necessary, because the act unites the parishes, whereas at common law the churches only could be united. The statute of 4 *W. & M.* relates only to churches united by the 17 *Car. 2.*, as appears by the preamble.

Per Curiam,

Rule discharged.

1801.

WILSON

VAN MIL-
DEBT.

1801.

April 29th.

Cox and Others, Assignees of EMMOTT a Bankrupt,
v. MORGAN.

Payment to
a creditor
under an ar-
rest after a
secret act of
bankruptcy
is protected
by 19 G. 2.
c. 32.

THIS was an action for money had and received to the use of the Plaintiffs. The general issue was pleaded, and the cause came on to be tried before Lord *Eldon* Ch. J. at the Guildhall Sittings in last *Hilary* Term, when a verdict was found for the Plaintiffs for 45*l.* 18*s.* 9*d.* subject to the opinion of the Court on the following case;—

The bankruptcy of *John Emmott* was proved, and the assignment to the Plaintiffs. The commission was dated the 14th *August* 1799. The act of bankruptcy was the lying in prison hereafter stated. *Emmott* was arrested at the suit of one *Dixon* on the 31st *October* 1798, and committed to the *Fleet* on that arrest on the 6th *November*. He remained in the *Fleet* on that account till the 16th *February* 1799, when he was discharged. *Emmott* had a partner named *Bray* who was abroad before he went to the *Fleet*; the partnership was indebted to *Morgan* the Defendant in the sum of 44*l.* 13*s.* 9*d.* on a bill of exchange accepted by *Emmott* and *Bray*, on the partnership account. The bill not being paid *Morgan* proceeded by original against *Emmott* and *Bray*, for the purpose of outlawing *Bray*, on the 14th *November* 1798, and employed a sheriff's officer to arrest *Emmott*, who could not find him. An *alias* was taken out, and the sheriff's officer went to his house and was told he was in the country. He afterwards met with him at his house and arrested him at the suit of *Morgan*, on 23d *February* 1799. He told the officer he was just returned from *Portsmouth*. *Emmott* immediately paid *Morgan's* attorney the 44*l.* 13*s.* 9*d.* and 1*l.* 5*s.* for interest which was paid over to *Morgan*. Neither *Morgan* nor any one concerned for him personally knew that *Emmott* had been in the *Fleet*, had committed an act of bankruptcy or that he was in insolvent circumstances.

The question for the opinion of the Court was, Whether the Plaintiffs were entitled to recover? If the Court should be of that opinion the verdict to stand; if not, a verdict to be entered for the Defendant.

Runnington Serjt. for the Plaintiffs. The question arising upon this case for the consideration of the Court, is Whether the payment to the Defendant of the 44*l.* 13*s.* 9*d.* is a payment protected

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Cox
v.
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by 19 Geo. 2. c. 32. That act provides, "that no creditor in respect of goods sold to the bankrupt or bills of exchange drawn, negotiated or accepted by the bankrupt *in the usual and ordinary course of trade and dealing*, shall be liable to refund to the assignees any money, which before the suing forth of the commission was really and *bona fide*, and *in the usual and ordinary course of trade and dealing* received by such person before notice of the bankruptcy or insolvency." It is contended, that the payment in this case was a payment within the terms of the act. It is admitted indeed, that the Defendant had no notice of the act of bankruptcy, but it remains to be considered whether this payment was in the usual and ordinary course of trade and dealing? It may be difficult perhaps to define the precise meaning of those words, but it is hardly possible to contend that a payment made in consequence of an arrest, is a payment in the usual and ordinary course of trade and dealing. Is it usual or ordinary for a merchant to refuse to pay his just debts unless compelled by law? The Court will rather confine the terms used in the Act of Parliament to a case in which the party paying has the free exercise of his discretion whether he shall pay or not. Indeed the very act of suing out a writ against a party puts an end to the usual and ordinary course of dealing. It is clear that unless the case come precisely within the terms of the act, the Court will not protect the payment: for in *Vernon v. Hall*, 2 T. R. 648. a payment by the drawee of a bill of exchange received from a third person for the sale of an estate, the drawee having become bankrupt without the knowledge of the holder, was held not to be protected, because the holder had given time to the drawee. The case *ex parte Congleton*, 3 Bro. Chan. Cas. 47. is to the same effect. It is true that previous to the case of *Vernon v. Hall* it was held in *Calvert v. Lingard*, sittings coram Lord Loughborough 1783, cited in 5 T. R. 209, and 2 H. Bl. 335. that payment under an arrest was within the Statute. The same was also decided in *Holmes v. Wennington* (a), Trin. 30 Geo. 3. in the

(a) *Holmes v. Wennington*. In the EXCHEQUER, Trin. 1798.

This was an action brought to recover back money paid by a trader after a secret act of bankruptcy to his creditor, who had arrested him for the money; the debt having been contracted in the course of trade, the payment having been made a few days

after the arrest and in consequence thereof, and whilst he was under the bankrupt confinement. The question at the trial was, whether this was a payment in the course of trade and protected by the Statute 19 Geo. 2. c. 32. *Lord Chief Baron* on the trial was of opinion, that the payment was protected by that Statute.

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the Court of *Exchequer*. With respect to the first of those cases it appears to be only a *Nisi Prius* decision, and there is no report of the

Wood for the Plaintiff. Had it been meant that any *bona fide* payment should come within the statute, the statute would have so expressed it: but there must be more than a *bona fide* payment; the payment must be in the usual course of trade and dealing. Can it be said that a payment by a man under *duress* is a payment in the course of trade? The preamble of the statute is the best exposition of what is a payment in the course of trade; that shews what the statute means by such a payment. Payment under *duress* of imprisonment, as suffering himself to be arrested, to have executions against him, &c. is not in the usual course of trade; it is an interruption at least of his trade, if not a total stoppage of it. Both *duress* of imprisonment and *duress* of goods shew insolvency. The payment must not only be *bona fide* but in the usual course of trade. It is not necessary he should be insolvent with respect to every body; arrest or execution either in body or goods preceding payment shews insolvency to the party suing at least; and that the payment is not in the usual course of trade. Payment in the usual course of trade is when bills are duly paid and honoured without driving a party to arrest, on failure of payment. As to the case of *Vernon* and others assignees of *Tyler v. Hankey*, 2 Term Rep. 113. there was a pretty strong notice of the act of bankruptcy. With respect to *Foster v. Allenson*, 2 Term Rep. 479. in that case no commission issued.

Manley on the same side. Payment, and in the usual and ordinary course of trade and dealing, are both requisite. *Vernon v. Hall*, 2 Term Rep. 648. goes to shew both requisite, because there the payment was *bona fide* and would have been good if in the course of trade, which the Court held it was not. In the case of *Calvert v. Lingard*, Lord *Loughborough* does not in summing up at all mention or advert to the usual course of trade and dealing. There is no decision since the act, that an arrest shall protect a payment subsequent to an act of bankruptcy; but it is clear that if followed up by a commission and assignment it has relation to the bankruptcy and avoids

the payment and all *mesne* acts, 1 Salk. 111. The case of *Billon v. Hyde and Mitchell*, 1 Ark. 126. is decisive to shew that the relation avoids payment, judgment, executions, and all legal acts, though Lord *Hardwicke* afterwards held that it appeared in that case that the bills were really paid in the usual course of trade. The act of suing out the writ determined the usual course of trade and dealing between the parties; and it may be difficult to define accurately what course of trade was in the meaning of legislature unless such as subsists between merchant and merchant, *viz.* payment on the usual credit given. In the case where payment has been upon an arrest, the Court have pointedly laid hold of the circumstance that the payment was before the act of bankruptcy. It is singular they should lay hold of that, if after bankruptcy it would have been good.

ERKE Chief Baron. Those cases only decide what shall impeach, not what shall protect the assignment, but do not determine how payment after the act of bankruptcy should be.

Manley. The Judges have often lamented that the Courts had not stuck more closely to the words of Acts of Parliament, particularly in the poor laws, and thought that if they had not brought cases within them by way of analogy they would thereby have avoided great confusion. Here the debt was contracted in the usual course of trade and dealing, but the payment was after an arrest, shall that protect him when the statute does not? Case of *Vernon* and *Hall* is exactly like this, except that the present was a compulsory payment.

ERKE Chief Baron. I decided this at *Nisi Prius* with very great doubt—I thought that tying up the words “in the usual course of trade and dealing” too closely would be very mischievous to the public; but I found a difficulty in drawing a line to satisfy my own mind; I thought a payment on arrest within it, and I did not then know of the case in the *Common Pleas*. What a debt contracted in the usual course of trade and dealing is, is easy to be ascertained; but as to payment in the course of trade

the case; and in the second a reason is given which does not seem sound; *viz.* that the party had used nothing but due diligence. But that reason is only applicable to cases of payment before the act of bankruptcy, which always turn on the point of fraudulent preference; whereas in the case of a payment between the act of bankruptcy and the commission, it is not only necessary that it should be made *bona fide*, but that it should be made by the bankrupt in the course of the trade. The cases of *Bradley v. Clark*, 5 T. R. 197. and *Pinkerton v. Marshall*, 2 H. Bl. 334. clearly shew that the 19 Geo. 2. c. 32. must be confined to the cases therein expressed, and that any deviation from the usual course of payment in the way of trade will prevent it from attaching.

Lens Serjt. contra. The circumstance of this payment having been made by compulsion brings the case more fully within the meaning of the Statute than if it had been made voluntarily. The object of the statute was to protect all *bona fide* payments to creditors in respect of goods sold or bills drawn in the usual course of trade. Now the debt in question arose upon a bill of exchange drawn in the course of trade; and as the payment was obtained by

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and dealing it is difficult to draw the line. Mr. Wood defines it to be a payment according to the terms of the contract; but it would be very mischievous to say that payments must be strictly according to the terms of the contract or punctually made; for that would shake almost all the payment in the city. Suppose a merchant says, call next week, cash is low; and the creditor calls again and is paid, can any man doubt that it is a good payment? Suppose he calls two or three times? As to what is said, that an arrest shews insolvency, that is a circumstance in evidence from which a jury may infer notice of it, but it is by no means decisive, and it must be something decisive to mark the line. If it be not evidence of insolvency, it is nothing but diligence to get his payment, and that ought not to defeat it. The other part of the act is more definite and more capable of being carried into execution. The inclination of my opinion without authorities was to have held it a good payment, and I should have to deter-

mined, though with difficulty in my own mind; but I am glad to be relieved from that difficulty by an authority in point. I allude to the case in *Common Pleas*, and on talking with the Judges of that Court, I find they are of that opinion. In the case of *Vernon and Hall* the doubt was whether the nature of the debt was not changed, having become a loan and no longer a debt within the statute. I acquiesce in the determination of the Court of *Common Pleas*, arrests are now very frequent, not on the ground of insolvency, but of quickening payments, which are within the statute.

HOTHAM Baron. I am satisfied with the opinion of the Lord Chief Baron: though it be difficult to draw the line, yet it is clear that the statute is a remedial law; it means to extend to payments made without improper motives on either side. I therefore think this payment is protected.

PERRY and THOMPSON Barons, were entirely of the same opinion.

Rule discharged without costs.

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compulsion it proves that the payment was made *bona fide* and without collusion between the parties. If there be no secret understanding between the parties, the payment must be considered as made in the course of trade: for it certainly is not contrary to the course of trade for a creditor to enforce payment of his debt by such means as the law authorizes. As there have already been two decisions upon this precise point the Court will not now set the question afloat again. The case of *Calvert v. Lingard*, was not a mere *nisi prius* determination; for the opinion of Lord Loughborough was afterwards confirmed by the whole Court of *Common Pleas*, as appears from the words of Lord Chief Baron Eyre in *Holmes v. Wennington*. This last case was much agitated in the *Exchequer*, and Mr. Baron Hotbām in giving his opinion said, "Though it be difficult to draw a line, yet it is clear that the statute is a remedial law, and means a payment without improper motive on either side."

Cockell Serjt. *amicus curiæ* said, that he recollected a case before Mr. Justice Buller where a party having committed an act of bankruptcy which was unknown to a creditor, the latter obtained payment of his debt by arrest, the assignees brought an action to recover the amount, and the learned judge held that the payment was protected.

Cur. adv. vult.

On this day the learned judges, not being unanimous, delivered their opinions *seriatim*.

CHAMBRE J.—This is an action for money had and received by the Defendants for the use of the Plaintiffs in their character of assignees of the bankrupt. The matter comes before the Court upon a special case, reserved on the trial of the cause before Lord Eldon at Guildhall, and the only question that has been argued (and as it seems to me the only question that can be made) is, whether the payment of the money for which the action is brought, and which was made by the bankrupt to the Defendant after an act of bankruptcy and under the circumstances stated in the case, is a payment protected by the statute 19 Geo. 2. c. 32. s. 1. or not? The circumstances under which the payment was made are these—that the bankrupt was arrested at the suit of a creditor on 31st October 1798, was committed to the Fleet the 6th November, and

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continued in Prison under that arrest till the 16th *February* 1799, when he was discharged. He had a partner named *Bray* who went abroad before the bankrupt went to the *Fleet*, and they became indebted to the Defendant by the acceptance of a bill of exchange on their partnership account. While the bankrupt was in prison, on the 14th *November* 1798, the Defendant sued out an original against the bankrupt and *Bray*, meaning to out-law *Bray*. The officer could not find the bankrupt to arrest him. An *alias* was sued out; the officer was told at his house he was out of town, but on the 23d *February*, (7 days after his discharge,) the officer met him and arrested him, and was told by him he was just returned from *Boston*; upon that arrest he paid the debt to the present Defendant's attorney. The Defendant had no knowledge of his imprisonment, his bankruptcy, or insolvency. Under these circumstances I am of opinion, that the payment is not protected by the statute. I should have given this opinion with much more satisfaction to myself if it had been fortified by those of the rest of the Court; but I stand single in my opinion here, both my Brothers thinking differently from me upon the subject, and I am also opposed by the authority of a determination of the Court of *Exchequer*, which (though there are material circumstances in the present case which did not occur in that) is a case in point as to the general question of a payment under an arrest being protected by the statute. That decision too is strengthened by and in a considerable degree, founded upon a determination of Lord *Loughborough* at *Nisi Prius*, which I learn from my Brother *Heath* was confirmed in this Court. I find from some notes I have procured of what was said by the Court at *Nisi Prius*, that a writ in that case had been sued out, but whether the party was arrested I do not know. I suppose he was. I am sensible of the weight of these authorities and of the respect that is due to them, though there are distinguishing circumstances in the present case, but if it was right to extend the act so far as is done in those cases I do not know what distinction is to be relied on; I feel myself therefore under the necessity of inquiring into the foundation of those decisions. I do it with the utmost distrust of my own judgment, but if I find no ambiguity in the act, and think (however erroneously) that the act has not been expounded but contradicted, I feel it my duty to adhere to the authority of the statute.

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Before the passing of this act I take the law to have been clearly settled, and so the act itself supposes, that when an act of bankruptcy had been committed and a commission issued in consequence of it, the property of the bankrupt was by relation so vested in the assignees, that any disposition of it by the bankrupt after the act of bankruptcy was void as against the creditors, however fairly such disposition was made, and without any regard to its being a voluntary or compulsory payment. Payments to a bankrupt stand upon a very different footing; and with reason. Even after notice of the act of bankruptcy the payment may be good if made under legal compulsion, for an act of bankruptcy is no defence against the action of the person who commits it unless a commission is taken out against him, and it is not the fault of the bankrupt's debtor if the delay of the creditors in suing out the commission deprives him of his defence; he ought not to increase the fund by paying his debt twice over. But compulsion against the bankrupt, however it may operate in protecting payments before the act of bankruptcy while the property is in the bankrupt himself (and which it does by excluding the imputation of fraud) can have no effect in protecting payments after the act of bankruptcy. The bankrupt himself does not suffer by the compulsion, and the compelling creditor has only to refuse what he ought not to have taken, and come in for his share in common with the other creditors. The question therefore must turn upon the operation of the statute, and we are only to see whether the payment on which the present question arises is there described. The recital of the statute is not immaterial, it states the frequent commission of secret acts of bankruptcy unknown to creditors and others with whom the bankrupts have dealings in trade, and their continuing afterwards to appear publicly and carry on their trade and dealing by buying and selling, drawing, accepting, and negotiating bills, and paying and receiving money on account thereof in the usual way of trade, and in the same open and public manner as if they were solvent persons. It then recites the discouragement to trade and prejudice to credit, from permitting payments to be defeated in the cases and under the circumstances above-mentioned, and enacts that no person who is or shall be really and *bond fide* a creditor of any bankrupt for or in respect of goods really and *bond fide* sold to such bankrupt, or for or in respect of any bill or bills of exchange really and *bond fide* drawn, negotiated or accepted by such bankrupt in the usual

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and ordinary course of trade and dealing, shall be liable to refund or repay to the assignee or assignees of such bankrupt estate, any money which before the suing forth such commission was really and bona fide, and in the usual and ordinary course of trade and dealing received by such person of any such bankrupt before such time as the person receiving the same shall know, understand or have notice that he is become a bankrupt, and that he is in insolvent circumstances. The nature of the debt in the case before the Court is not denied to be such as the statute describes, but is the mode of payment such as the statute requires? The debt has been really paid. It is stated (and so we must take the fact to be, though I think the circumstances would have warranted a contrary conclusion) to have been paid without the Defendant's knowledge of bankruptcy or insolvency; but that is not all that the statute requires. It is further required, to be the usual and ordinary course of trade and dealing, and on those words the question, or at least my difficulty arises. I have endeavoured to obtain an account of the two authorities wherein a payment under an arrest has been held to be protected, and to my great disappointment I find little or no argument applied to the very important words I have last alluded to, but a good deal to a circumstance on which the statute is totally silent, namely, a compulsive payment, which was undoubtedly bad before the act. In the case at *Nisi Prius* the question is considered as a question of notice of insolvency, and what is presumptive evidence of such notice, or of collusive payments and preferences. It is said, that a knowledge of the debtor's being poor or in failing circumstances would not vitiate the payment, and that compulsive payments were meant by the act to be protected. They are protected before the act of bankruptcy, but the Act of Parliament I think has no view whatever to compulsive payments either, before or subsequent to the act of bankruptcy. The argument of the Court of *Exchequer*, though expressing great doubts on the subject, disposes of the language of the act on which the question arises, in a way that would solve every difficulty in every case; it cuts the knot at once. It is said to be easy to ascertain what is a debt contracted in the course of trade, and therefore the decision in *Kerran* and *Hall* is approved of, but as to payments in the usual and ordinary course of trade and dealing, it is said to be difficult to draw the line. Then an inaccurate definition of such payments supposed to have been used in argument

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ment by the counsel is controverted, and we hear no more of those words or of any construction of them; they are in effect expunged from the statute, and what follows amounts only to this, that the circumstance of an arrest can only be used as evidence to be left to a jury, of notice of insolvency, and that if not evidence of such notice it is nothing but diligence to get payment, a means to quicken the payment which ought not to defeat it, and that it is sufficient that there is no improper motive on either side. As to the difficulty of defining what are payments in the usual and ordinary course of trade and dealing, without feeling much of that difficulty it may be sufficient for me to say, that it is not necessary in deciding one case upon an Act of Parliament to decide all the cases that may possibly happen, and that if in the case before us, we can say, that the payment was not in the usual and ordinary course of trade and dealing, we have no occasion to go further; I have no difficulty in saying, that I admit that diligence in procuring payment of a debt used in the common and ordinary way would not of itself defeat a payment; I have as little difficulty in saying, that it is no part of the purview of the act to afford particular protection to diligence or activity in recovering debts; on the contrary the intention is manifestly to protect only those who are deluded by specious appearances of solvency and credit; and though it be true that improper motives or knowledge of insolvency may vitiate payments otherwise good, yet purity of motives alone, without the concurrence of the other circumstances required by the statute will not give validity to such payments made after the act of bankruptcy. The intention of the act is not generally to authorise creditors to retain what they had received without knowledge of insolvency: it is to place creditors of a particular description, and under particular circumstances, in a better situation than the general mass of creditors. That being the object of the act, it was necessary in order to prevent litigation and the extension of the act to persons not intended to receive the benefit of this preference, to describe with precision the condition of those who were to have the preference; the legislature have done it with guarded attention, by using as definite and restrictive language as could well be found to answer that purpose. To prevent the effect of any ambiguity in the meaning of the word "usual" they add the word "ordinary". The payment must not only be in that course of trade and dealing which is usual,

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usual, but it must be that which is in the ordinary use. The propriety of confining the act to its declared objects is distinctly stated by Lord *Kenyon*, in the case of *Bradly v. Clarke*, 5 *Term Rep.* He says "The legislature have chosen to use particular words and to confine the remedy to particular cases. The statute only extends to two cases of which this is neither. Whether or not it would have been wise to have extended this provision to all cases I will not presume to determine, though I cannot refrain from observing, that had that been the case all the property of a bankrupt might be conveyed to one creditor to the exclusion of the rest. In determining on this Act of Parliament it is sufficient to say, that this case is not within the words, nor, as far as I can collect, the intention of the act; though had it clearly and indisputably appeared to have come within the meaning of the act, I should have been inclined to have extended it to this case." The case of *Vernon and Hall* (if cases were necessary) appears to me a strong authority that the act ought not to be extended in construction. If it be said that that case applies only to the nature of the debt which was held to be turned into a loan, I answer that the words of that part of the clause which describes the nature of the debt as to the course of trade are exactly the same with those which relate to the mode of payment; the debt there having been also contracted as described in the act, the decision may properly refer to the mode of payment; but whether it does or not the case proves that the act ceases to operate when circumstances not referable to a trading are introduced. As a remedial act I am ready to give it every extension, by construction, that remedial acts are entitled to; but no principle applying to the construction of remedial acts authorises the extension of them contrary to the intention of the Legislature. It may also be remarked, that all the other bankrupt laws are remedial; that this particular act trenches upon the great leading principle of the bankrupt laws, that of securing the property for equal distribution, by giving a preference to a particular class of creditors; and therefore is not peculiarly entitled to have its operation extended by construction. It is time to resort to the facts of the case and see how far they answer the description contained in the act. When the bankrupt had been publicly and openly carrying on his business we nowhere learn, we have no act of trading stated, but the acceptance of the bill as a partner with another person. After that he is arrested for debt, goes to gaol

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and lies there near four months. After that act of bankruptcy it is not in evidence that he ever appeared publicly and carried on his trade and dealing in the usual way of trade, and in the same open and public manner as if he was a solvent person, all which circumstances are by the preamble supposed to attach themselves to the situation of the bankrupt, whose payments were meant to be ratified by this act; on the contrary, he was arrested by the Defendant within a week after his discharge, having according to his own account gone off to *Portsmouth* in the meantime. Was the Defendant deluded by any specious appearances of solvency at the time of the payment? He had sued out an original against the two partners very soon after the bankrupt went to prison. The other partner was gone out of the kingdom. The Defendant could not be found by the officer; an *alias* became necessary; he is met with accidentally, not having been found at his own house, and arrested; to deliver himself from that arrest he makes the payment. Can we say this is a payment made by a person carrying on his business as a solvent man, in an open and public manner, or which comes more directly to the enactment of the statute, Was this a payment in the usual and ordinary course of trade and dealing? Are sheriffs' bailiffs the persons who transact the affairs of merchants and traders in the ordinary course of trade and dealing? If this will do where are we to stop? This is a case where payment has been made under an arrest, but why stop there? Will not the argument go equally to protect payments after suing out execution? If indeed the sheriff seizes and sells the effects, that may not be considered as a payment by the party, but I can find no difference between the present case, and cases where the bankrupt pays the money to prevent the seizure, or to redeem the goods after seizure, or even to redeem his person after he is taken upon the *ca. sa.* and payments under all these circumstances we are desired to consider, as made under appearances of perfect solvency on the part of the bankrupt, and in the ordinary course of trade. I feel the weight of the authorities against the opinion I am delivering, and I am fully aware of the propriety of adhering to former decisions, and the mischief of lightly departing from them, but I am in some degree relieved from their pressure by these considerations, that the attainment of certainty is the chief reason for submitting to the authority of such determinations as are not perfectly satisfactory in respect of the arguments on which they were founded, and that in my view of

the case before us, certainty will be better attained by bringing back our attention to the language and meaning of the Act of Parliament which is to be the rule of our conduct, than by following the determinations; to what uncertainty they lead we have an instance in the late attempt in the Court of *King's Bench*, to bring payments to carriers for the carriage of goods within the protection of the statute, which I can only attribute to the great latitude of construction used in the former cases. On these grounds I feel myself bound to give my opinion, that the payment in question is not supported by 19 *Geo. 2.*, and that the Plaintiffs the assignees are entitled to recover.

ROOKE J.—In this case, a bill drawn *bond fide* and in the ordinary course of trade has been paid after an act of bankruptcy, immediately upon the bankrupt's being arrested, and neither the creditor nor any one concerned for him knew that the bankrupt had committed an act of bankruptcy or was in insolvent circumstances. The question is, whether this payment being immediately upon an arrest is a payment in the ordinary course of dealing? or whether being a payment by legal compulsion, it is not out of such ordinary course? In deciding this question I think I ought to look to the effect of using legal diligence in other cases respecting bankruptcy, and to see in what light courts of law have considered it. The statute 1 *Jac. 1. c. 15. s. 14.* provides "that no debtor of a bankrupt be hereby endangered for the payment of his debt truly and *bond fide* to any bankrupt before such time as he shall understand or know that he is become bankrupt." The strict construction of this statute would be, that if he did understand or know it, his payment should be endangered: but courts of law have held, that if a creditor has notice of a bankruptcy and pays under legal coercion he shall be protected. See 3 *Keble* 231. *Freeman* 349. S. C. 2 *Term Rep.* 479. Here then a payment by legal compulsion is supported, even against the obvious construction of the statute, and hence I conclude, that in cases of bankruptcy payments by compulsion of law are favoured and protected. The words of the statute 19 *Geo. 2.* are very different from those of 1 *Jac. 1.*; but they do not expressly avoid payment by legal coercion, nor exclude them from protection: and if excluded, they must be excluded by implication only; and such implication if applied to the whole clause on which this question arises will go a great way indeed to invalidate *bond fide* payments to honest creditors. The statute 19 *Geo. 2.* so far as respects bills, requires that

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they be drawn, negotiated, or accepted really and *bonâ fide*, and in the usual and ordinary course of trade and dealing. Now if an arrest so far changes the ordinary course of trade and dealing as to affect the payment of a bill, it will equally affect the drawing, the negotiating, or the accepting it. The consequence will be, that if a debtor having committed a secret act of bankruptcy is arrested and gives or accepts a bill payable at a future day, and actually pays it, and then a commission issues, the assignees may recover back the money. This will be a very dangerous construction and will render all transactions under arrest very precarious. It has been suggested, that payment under arrest is not to be favoured, because the arrest is a circumstance which should raise a suspicion of insolvency. If so, by the same reasoning, payment under a threat of arrest will be equally suspicious; for whether a man pays before the bailiff arrests him or after, if he pays under the terror of a gaol he pays under compulsion; and the compulsion in either case may with equal reason raise a suspicion of insolvency. If a threat to arrest does not alter the nature of a payment and take it out of the ordinary course of dealing (and it has not been contended in argument that it does) it will be difficult to assign any sound reason why an actual arrest should do so. There are stages in the proceedings between the threat and the actual arrest which are as much out of the ordinary course of dealing as the arrest itself; and what line shall we draw by our discretionary construction where the Legislature has drawn none? Shall we enquire, Is the writ purchased? Is it delivered to the bailiff? Is the bailiff in the house? Has he seized the debtor? or, Is he only in the act of doing it? When is it that the ordinary course ceases and the extraordinary begins? As the words "usual and ordinary course of trade and dealing" do not necessarily exclude transactions either by menace or by compulsion of legal process, I am not disposed to extend them to either case; they are general words and they may be intended to apply to the case of undue preference: for a man may be disposed to pay a debt really and *bonâ fide* due from a desire to favour a particular creditor, and may go out of the ordinary course of trade and dealing to do so. Payments under legal compulsion having been favourably considered by our Courts in the construction of 1 Jac. 1. I think they ought to be as favourably considered in the construction of 19 Geo. 2. which is in *pari materiâ*. Legal coercion is a course which the law allows, and surely if we at-

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tend to the literal construction of the statute, it is neither unusual nor extraordinary nor out of the ordinary course of dealing for a creditor to be driven to arrest his debtor, or to use legal diligence in order to procure payment. The taking out legal process does not depend so much on the real credit of the debtor as on the patience or impatience of the creditor. If a creditor is obliged to call three or four times on a debtor before he can obtain payment it may awaken suspicion. If a patient creditor does this and receives payment, he is protected. Shall we say that if a harsh creditor calls once, and then arrests and is paid, he shall refund? Shall we consider his severity as a proof of his debtor's insolvency? The statute has given one positive criterion, *viz.* knowledge of the bankruptcy or insolvency; and has also required that the transaction shall be in the ordinary course of trade and dealing; but as it has not defined what that ordinary course must be, the courts of law must, as cases arise, declare what is within the ordinary course and what is not. I have now given my reason, why upon general principles I think that arrest or legal diligence is not within the restriction of the statute: but if it were a doubtful point how the statute should be construed, I must consider myself as bound by the construction it has already received in two Courts in *Westminster-hall*. The case of *The Assignees of Jones v. Lingard* was tried before Lord *Loughborough*, and afterwards was heard in this Court on a motion for a new trial. There the creditor brought an officer with the writ into the shop, and then the debt was paid, and the payment was held to be good. The case of *Holmes v. Wennington* was decided on solemn argument in the Court of *Exchequer*. These cases have been cited in the Court of *King's Bench*, in the case of *Bradley v. Clarke*. *Pasch. 1793. 5 Term Rep. 200.* and no doubt was hinted in that court as to the propriety of the decisions; yet Lord *Kenyon* particularly notes, how right it is to adhere to the words of the statute. We are also informed, that the late Mr. Justice *Buller* ruled the same point on the Northern Circuit, and that no application was made for a new trial. For these reasons I think, the verdict should be entered for the Defendant.

HEATH J.—The question is whether a payment to a tradesman who has committed a secret act of bankruptcy, to a creditor who has arrested him, and who has no knowledge of the act of bankruptcy or of the insolvency of his debtor, be good within the statute of 19 *Geo. 2.*?

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Before that statute, it was the policy of the bankrupt laws in all cases to deprive the bankrupt, by relation to his act of bankruptcy, of the power of disposing of his effects. In order to avoid the inconveniencies arising from too rigid an observance of this principle, the act in question was made. It has always been considered as a remedial statute, and as such is entitled to a liberal construction. In order to give validity to the payment of a bill of exchange, it must be drawn and the money received in the ordinary course of trade. In my apprehension this bill had both requisites. Of the consideration of the bill there is no question. The bill was due before it was paid, and it was not officiously paid by the bankrupt. The objection is, that the payment was made under the terror of an arrest. If the bill had been paid before it became due, or if the bankrupt had solicited the Defendant to receive the money, those circumstances would have vitiated the transaction, and would have brought the case within the statute. It is objected that the payment is under an arrest. If this were to be the ground of the decision it would introduce great uncertainty. For if an arrest will vitiate a payment, why not a menace, and if a menace, why not a promise of some collateral advantage. There are two principles on which I shall found my judgment. The first is the general policy of the law, that the using of legal diligence is always favoured and shall never turn to the disadvantage of the creditor. The maxim *vigilantibus et non dormientibus succurrunt jura* is one of those that we learn on our earliest attendance in *Westminster Hall*. The second principle is, that this statute shall receive a construction agreeable to the general policy of the bankrupt laws, namely, that it shall not be in the power of the bankrupt to dispose of his effects after his bankruptcy in such a way as to give a preference to a favourite creditor. Now if payment under an arrest, though otherwise in a due course of trade, were to be held bad, the consequence might be, that if in the same day, or at the same instant, two creditors should apply for payment of their respective demands, the bankrupt might make a good voluntary payment to one creditor, and refuse payment to the other till there had been some menace or actual arrest made to vitiate the payment. I can see no inconvenience from this construction. If it be said, that the creditors under an arrest might sweep away all the effects of the bankrupt; so may the favoured creditor under a voluntary payment; and the latter mischief is the most to be apprehended. Therefore I am of opinion, as well upon the general policy of

the law that favours the legal diligence of creditors, as on the particular policy of the bankrupt laws, that this is a good payment and protected by the statute of 19 *Geo.* 2. If the case were doubtful, the decisions ought to put an end to the controversy. I allude to the cases of *Galvert* and *Lingard* in this Court, and of *Holmes v. Wennington*. I cannot pass over in silence the opinion and decision of the late Mr. Justice *Buller*, whose judgment will always have the greatest weight with me. The question is whether this be a doubtful case? A case may not be the less doubtful because I entertain no doubt on the subject; but that is doubtful concerning which learned men differ. For these reasons I am of opinion, that the Plaintiff is not entitled to recover, and that a verdict should be entered for the Defendant.

Verdict to be entered for the Defendant.

(IN THE EXCHEQUER CHAMBER.)

HILL Gent. one, &c. v. HALFORD and Another;
in Error.

April 29th.

ERROR from a judgment of the Court of *King's Bench* in an action by the payee against the maker of a promissory note. The first count of the declaration stated that, "the Plaintiff in error made and signed his certain note in writing, commonly called a promissory note bearing date &c. and thereby promised to pay to the Defendants in error by the names and description of &c. the sum of 190*l.* on the sale or produce, immediately when sold, of the *White Hart, St. Albans, Herts*, and the goods, &c. (meaning a certain messuage or dwelling-house called the *White Hart*, situate at *St. Albans*, in the county of *Herts*, and certain goods being therein) value received, and then and there delivered the said note to the Defendants in error;" after alleging the liability of the Plaintiff in error to pay, and his promise as usual, the declaration averred, "that afterwards and before the exhibition of the bill of them the Defendants in error, to-wit on, &c. at, &c. the said messuage or dwelling-house called the *White Hart*, and the goods in the said note specified were sold, whereby the said sum

A note promising to pay "on the sale or produce, immediately when sold, of the *White Hart, St. Albans, Herts*, and the goods, &c. value received," cannot be declared upon as a promissory note within the statute, though it be averred, that before the action commenced the *White Hart* and the goods were sold.

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of money in the said note specified became and was forthwith and immediately due and payable according to the form and effect of the said note, whereof the Plaintiff in error then and there had notice." There were other special counts, and also the common money counts and conclusion. On this declaration judgment having gone by default, a writ of inquiry was executed, and the Defendants in error recovered general damages.

The causes now assigned for error were, "that by the record aforesaid it appears, that damages have been assessed for and adjudged to the Defendants in error, upon the whole of their said declaration generally; whereas it appears in and by the record aforesaid, that the first count of the said declaration was and is insufficient in law, and that no damages could or ought by law to have been assessed or adjudged to the said Defendants in error in respect thereof, or of the supposed promise and undertaking therein mentioned."

Laws for the Plaintiffs in error contended, that the note on which the first count of the declaration was founded could not be sustained as a promissory note, inasmuch as the payment thereof was made to depend upon a contingency which might never happen, *viz.* the sale of the *White Hart Inn*, the title to which might be so bad, that no purchaser would be found. He cited *Duncker v. Lord Deloraine*, 2 Bl. 782. 3 Wils. 207. S. C. and *Carlos v. Fancourt*, 5 Term Rep. 482.

Wigley contra. In those cases in which it has been discussed whether a note payable upon a contingency were a promissory note within the statute, the question has principally turned upon the point whether the note in question were negotiable or not; the necessity of which may perhaps be doubtful. With respect to *Carlos v. Fancourt*, it appears, that in that case there were other objections to the Plaintiff's recovery; for though the note was made payable "out of the Defendant's money which should arise from his reversion of 43*l.* when sold," it was not, as in this case, averred that the reversion had been sold; and that circumstance was observed upon by Mr. Justice *Grose* in his judgment. If ever there was a note depending upon a contingency, it was that which in the case of *Andrews v. Franklin*, 1 Str. 24. was held to be a good note.* There the contingency was, after a certain ship should be paid off; now if it were a private ship no wages could have been earned unless the ship arrived; and if it were a public ship the

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wages might have been lost by desertion. In *Evans v. Underwood*, 1 *Wils.* 262. a note payable upon the like contingency to the former was held good: and in *Julian v. Shobbrook*, 2 *Wils.* 9. the Defendant having accepted a bill payable when in cash for the cargo of the ship *Tbetis* was held liable on the bill notwithstanding a motion in arrest of judgment on the ground of its being a conditional acceptance. Now if there be any similarity between the situation of parties to bills of exchange and promissory notes, it is between the situation of the acceptor of a bill of exchange and the maker of a promissory note. With respect to *Dawkes v. Lord Deloraine*, that was the case of a bill of exchange payable out of a particular fund, whereas the note in the present case is not payable out of a particular fund, but only at a particular time, which time is alleged in the declaration to have arrived. Supposing however, that this note is not negotiable, yet it seems from the words of 3 & 4 *Ann. c. 9. s. 1.* that an action may be maintained upon it, for the former part of the section enacts, that where promissory notes are made payable to any person or persons, his or their order, or unto bearer, the sums mentioned in such notes shall be payable to such person or persons, without any reference to their negotiability: but the ensuing part of the same section only makes them assignable or indorsable over when drawn to any person or persons, his, her, or their order. If therefore negotiability be of the essence of a note, and the words of the statute are to be construed strictly, no man can declare upon a note which is not made payable to order. But it has been decided in *Burrell v. Slocock*, 2 *Ld. Raym.* 1545. that a promissory note payable to *A. B.*, without adding either order or bearer, is a good note within the statute; and that case has since been recognized in *Smith v. Kendall*, 6 *Term Rep.* 123. In this case the note in question was drawn for value received on a promise to pay when the premises at *St. Albans* should be sold, and there is an averment in the declaration that the premises have been sold.

The Court (*absente* Lord ELDON Ch. J.) were clearly of opinion, that the note in question could not be declared upon as a promissory note within the statute.

Judgment reversed.

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May 4th.

SALKELD Gent. one, &c. v. LANDS.

If a Defendant being arrested upon process in *K. B.* give a warrant of attorney to confess judgment; and be afterwards holden to bail in *C. B.* in an action upon that judgment the Court will discharge him upon a common appearance.

THE Defendant in this case having been arrested by process out of the *King's Bench*, gave a warrant of attorney to confess judgment; on that judgment the present action was commenced, and the Defendant holden to bail. A rule *Nisi* having been obtained for discharging him on entering a common appearance,

Marshall Serjt. shewed cause and contended, that the Defendant was well holden to bail, inasmuch as no bail had ever been given on the former arrest, and therefore the rule that bail could not be taken *in infinitum* did not apply here. He cited *Kendall v. Carey*, 2 *Bl.* 768. where a Defendant having given bail in error upon a judgment in the *King's Bench*, and afterwards holden to bail in this Court in an action of debt upon the same judgment, this Court refused to discharge him, *Gould J.* saying, "the reason of this practice is because there has never been bail given in this Court."

Cockell Serjt. *contra* insisted, that this was within the rule that no man should be twice holden to bail for the same cause of action, and that the custody was the same as in the former arrest.

The Court (consisting of *HEATH*, *ROOKE*, and *CHAMBRE Js.*) were of opinion, that the giving a warrant of attorney to confess judgment was tantamount to giving bail in the first action, and that the Defendant in this case, if held to bail again, would suffer precisely the same vexation as in the common cases to which the rule was allowed to extend.

Rule absolute.

May 4th.

ROBINSON v. DUNMORE.

If *A.* send goods by *B.* who says "I will warrant they shall go safe," *B.* is liable for any damage sustained by the goods, notwithstanding *A.* send one of his own servants in *B.*'s cart to look after them.

ASSUMPSIT. The declaration stated, that in consideration that the Plaintiff, at the special instance and request of the Defendant, would deliver to the Defendant divers goods and chattels (specifying them) to be taken care of, and safely and securely carried and conveyed by the Defendant in and by a certain cart of Defendant from *A.* to *B.* and there to wit, at *B.* to be safely and securely delivered to one *J. S.* for certain hire and reward to the

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Defendant in that behalf, the Defendant undertook and promised to take care of the said goods and chattels, and safely and securely to carry and convey the same in and by his said cart from *A.* to *B.* and there to wit, at *B.* safely and securely to deliver the same to the said *J. S.*; that the Plaintiff did afterwards deliver the said goods and chattels to the Defendant, to be carried, conveyed, and delivered as aforesaid. And that although the Defendant had and received the said goods and chattels for the purpose aforesaid, yet he did not take care of the said goods and chattels, or safely and securely carry or convey the same in and by his said cart or otherwise from *A.* to *B.*, nor there to wit, at *B.* safely and securely deliver the same to the said *J. S.*, but on the contrary so carelessly conducted himself in and about the carriage and conveyance of the said goods and chattels, that a great part of them, to wit, &c. through his negligence were wetted and damaged.

The Defendant pleaded *Non-assumpsit*.

The cause coming on to be tried before Lord *Eldon* Ch. J. at the *Westminster* Sittings after last *Hilary* Term, it appeared in evidence, that the Plaintiff who was an upholsterer, having occasion to send some furniture into the country, agreed with one *Groves* a carman, to take the same for ten guineas, exclusive of tolls; that *Groves* thinking the distance too great, offered the Defendant who also kept a cart and horse, the refusal of the job, who agreed to undertake it and gave *Groves* half-a-guinea by way of gratuity; that the Plaintiff having acceded to the Defendant's offer to go instead of *Groves*, the Defendant brought his cart to the Plaintiff's house, where the goods were loaded in the presence of the Plaintiff himself, and with the assistance of two of the Plaintiff's servants; that the Plaintiff having observed that the tarpaulin which the Defendant had brought for the purpose of covering the cart was too small, the Defendant said, "I have plenty of sacks, and I will warrant the goods shall go safe." On account of the Defendant being a stranger to the Plaintiff, the latter sent one of his own porters with the cart, who would otherwise have gone by the stage; that this porter in the course of the journey paid a person for watching the goods one night; and that the goods in the course of the journey were damaged by rain. A verdict was found for the Plaintiff under his Lordship's direction, with liberty for the Defendant to move that the verdict might be set aside and a non-suit entered.

Accordingly

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Accordingly *Williams* Serjt. having obtained a rule *Nisi* for that purpose, was this day called upon by the Court to support the rule. It does not appear from the evidence that the Defendant ever had such possession of the Plaintiff's goods as to render him liable in the character of a common carrier. On the contrary it is clear from the Plaintiff having sent his porter to accompany the cart, that he never intended to relinquish his control over the goods; and the circumstances of the loading having been made at his house and under his inspection, and of the porter having paid for watching them during the journey strongly corroborate that idea. In this case there was no bailment: the Defendant could neither have maintained trespass or trover. It was a mere contract between the Plaintiff and Defendant, that the former should hire and the latter should let a cart and horse for the conveyance of the Plaintiff's goods. The case strongly resembles that of *The East India Company v. Pullen*, 1 Str. 690. where the Company having brought an action against a lighterman it appeared, that as soon as the goods were put into the lighter, an officer of the company went on board, and put the company's locks on the hatches: and Lord *Raymond* Ch. J. held that the goods were not to be considered as ever having been in the possession of the lighterman, but in the possession of the company's servant who had hired the lighter to use himself. There are many cases in which persons having a much greater control over goods than the Defendant had, are yet not considered as having the possession: such are the cases of a butler who hath the charge of his master's plate, and the shepherd who hath the charge of his master's sheep, 1 H. P. C. 506. c. 43. It is true that in the present case the Defendant made use of the expression, that he would warrant that the goods should go safe. But under all the circumstances, it may be argued, that it was not his intention by that expression to do any thing more than enforce his own opinion. Admitting however, that the Jury have decided that point against the Defendant, yet no advantage can be taken of the warranty in the present action, since the averment that the goods were delivered to the Defendant has not been substantially proved.

HEATH J. (stopping *Vaughan* Serjt. for the Plaintiff.)—The Defendant in this case is not charged as a common carrier: he is charged on a special undertaking; and the Jury have found on good grounds that the undertaking stated in the declaration was

made by the Defendant. They have decided upon considering the whole transaction, that the words used by the Defendant amounted to a warranty; and we cannot say that they have done wrong. It is quite immaterial to this case whether the Defendant had a special property, or any property whatever in the goods; or whether he could have maintained an action of trespass or trover. He must have had possession of them for the purpose of carrying his contract into effect, which he could not have done without such possession.

ROOKE J.—This is not the case of a common carrier, for the Defendant has specially undertaken to carry the goods safely.

CHAMBER J.—This is a very clear case. The Defendant is not a common carrier by trade, but has put himself into the situation of a common carrier by his particular warranty. As to possession, that seems clearly proved by the circumstances of the case; the Defendant attends with his horse and cart at the Plaintiff's house, where the goods are delivered to him and put into the cart by the Plaintiff's servants. This is a complete possession. How is this affected by the presence of the Plaintiff's servant? It has been determined, that if a man travel in a stage coach and take his portmanteau with him, though he has his eye upon the portmanteau yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost^(a). In this case the Plaintiff for greater caution sends his servant with the goods, who pays for watching them because he apprehends danger of their being stolen. So the man who travels in a stage has some care of his own property since it is more for his interest that the property should not be lost than that he should have an action against the carrier. This case bears no resemblance to that cited from *Strange*, for there the decision proceeded on the usage of the *East India Company*, who never intrust the lightermen with their goods, but give the whole charge of the property to one of their own officers who is called a guardian. The evidence of the warranty is perfectly clear, for on the Plaintiff's making some objection to the smallness of the tarpaulin, the Defendant in order to remove that difficulty, informed him that he had plenty of sacks to cover the goods, and undertook that they should be carried safe. It appears to me, that the verdict is perfectly right, and that the Jury could not have done otherwise than they have done.

Postea to the Plaintiff.

(a) So "it is no excuse for an innkeeper to say that he delivered the key of the chamber door to the guest in which he is lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guests in safety; and therewith agree 22 H. 6. 21. 11 H. 4. 45. 42 Ed. 3. 11." *Cady's case*, 8 Co. 33.

May 5th.

BOLT v. MILLER.

An affidavit to hold to bail, in which a tender in bank notes is negatived by the Plaintiff's clerk alone, then resident in London, is insufficient if the Plaintiff be also resident in London; though the debt arose upon a bill transaction, of which the clerk had the sole management. If an affidavit to hold to bail be made by a person *prima facie* incompetent to make it; *quære* whether circumstances proving him to be competent can be shewn by affidavit for cause against a rule for discharging the Defendant on a common appearance.

THIS was a rule calling on the Plaintiff to shew cause why the Defendant should not be discharged out of custody, on the ground of the affidavit of debt having been sworn by a clerk of the Plaintiff's, and of his having taken upon himself to negative any tender in Bank notes, as well as to swear to the debt.

In shewing cause against this rule, *Best* Serjt. produced affidavits of the Plaintiff and of his clerk, to shew that the debt in question arose upon a bill transaction, which had been completely conducted by the clerk, and that the Plaintiff himself, though living in London, knew nothing of the business. He also referred to *Chatterley v. Finck*, *ante* p. 390. and also to the *Mayor of London v. Dias*, 1 *East*. 237 (a). where an affidavit of debt made by "James Byfield clerk to R. C. Esq. chamberlain of the city of London," negativing the tender in Bank notes was held sufficient.

But *The Court* (consisting of HEATH, ROOKE, and CHAMBERE Js.) were of opinion, that though the debt might be better sworn to by the clerk than the Plaintiff still they should both have joined in negativing the tender in Bank notes as they were both in London. They also seemed to doubt whether admitting affidavits explanatory of the reasons why the clerk made the affidavit of debt was not trenching on the rule laid down that no supplemental affidavit ought to be received to cure defects in affidavits under the *Bank Act*.

Rule absolute (b).

(a) See also *Knight v. Keyte*, 1 *East*. 415.

(b) See *Smith v. Tyson*, *ante*, p. 389. and *Stacey v. Federici*, *ante*, 390.

May 7th.

POWELL v. FULLERTON and POWELL.

A writ in debt may be abated in part and stand good for the remainder.

If a plea in abatement contain matter which goes in part abatement of the writ only, but conclude with a prayer that the whole writ may be abated, the Court may abate so much of the writ as the matter pleaded applies to.

DEBT for 5000*l*. The declaration consisted of five counts; the 1st and 2d were upon bond; the 3d for money borrowed; the 4th on an account stated, and the 5th for interest.

The Defendant *Fullerton* pleaded to the 1st and 2d counts of the declaration *Non est factum*, and put himself upon the country, and then proceeded thus “and as to the writ of the Plaintiff and the declaration founded thereon as to the 3d, 4th, and 5th counts the Defendant prays judgment of the said writ and the said declaration as to the said 3d, 4th, and last counts, and that the said writ and declaration as to those counts may be quashed because he saith that the said several supposed debts or sums of money in said 3d, 4th, and last counts respectively mentioned if any such debts or sums of money were accrued or were due and owing unto the Plaintiff were and each and every of them were and was due and owing from the Defendants jointly and together with one *Robert Dyde* unto the Plaintiff and not from the Defendants only, and which said *Robert Dyde* is still living to wit at *Westminster* aforesaid in the said county and this the Defendant *Fullerton* is ready to verify wherefore inasmuch as said *Robert Dyde* is not named in the said writ and declaration the Defendant *Fullerton* prays judgment of the said writ and the said declaration as to the 3d, 4th, and last counts thereof and that the said writ and said declaration thereon founded as to the said last-mentioned counts may be quashed.”

To this plea, to the three last counts, the Plaintiff demurred “because she saith that the said plea of the Defendant *Fullerton* and the matters therein contained in manner and form as the same are above pleaded and set forth are insufficient in law to quash the said writ and the said declaration thereon founded as to said last mentioned counts or to excuse the Defendant *Fullerton* from answering the Plaintiff in respect of those counts nor is the Plaintiff under any necessity nor in anywise bound by the law of the land to answer the said plea. And this &c.”

The Defendants joined in demurrer.

Best Serjt. in support of the demurrer. The writ in debt being a general writ cannot be abated in part; now the plea in abatement pleaded by *Fullerton* goes only to the three last counts of the declaration, and at any rate is bad, because it prays judgment of the whole writ. Where by the writ two distinct things are demanded, it may be abated in part and stand good for the remainder; but in this case the single demand contained in the writ is for 5000*l.* It might be different indeed if the Plaintiff on his own shewing appeared to have no cause of action for more than a part; but here the matter relied on by *Fullerton*, by way of answer to part of the demand contained in the Plaintiff's declaration, is pleaded

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pleaded by *Fullerton* himself. In *Weeks v. Peach*, 1 *Salk.* 179. it is said "If a plea begin with an answer to the whole but in truth the matter pleaded is only an answer to part, the whole plea is naught and the plaintiff may demur." Now in this case the plea begins with an answer to the whole writ, whereas the matter pleaded is only an answer to part of the writ.

Onslow Serjt. *contra*.—There is a case 1 *Hen.* 5. fol. 4. b. pl. 5. which is an express authority to shew that a writ in debt may be abated in part and stand good for the remainder. That was a writ in debt in which the Plaintiff demanded parcel on obligation, and parcel on simple contract, and there was a variance between the Defendant's name in the writ and in the obligation; for this cause the writ was abated as to the obligation, but the Plaintiff prayed that the Defendant might answer as to the simple contract; upon which follows this observation in the report "*quod nota* that the writ in debt may abate in part and stand good in part." Another strong authority to shew that the writ may be abated in part is *Godfrey's* case, 11 *Co.* 45. b. and the cases there cited. Had the Defendant in this case prayed that the declaration only might be quashed, the answer would have been "plead to the writ." In none of the entries is there any precedent of a plea that others were joint contractors with the party sued, praying that the declaration only may be quashed, though there are several praying that the writ only may be quashed. *Clift. Ent.* 4. pl. 6. p. 7. pl. 17. In this plea the Defendant *Fullerton* only prays judgment of the writ, and the declaration as to the 3d, 4th, and last counts; in that respect following the rules prescribed by the Court of *King's Bench*, in *Herries v. Jamieson*, 5 *Term Rep.* 553. and not as in that case pleading to the whole declaration matter which only answers part of the declaration.

Cur. adv. vult.

HEATH J. (after stating the pleadings)—It was contended in support of this demurrer, that the plea demands that the whole writ shall be abated, whereas the matter pleaded only applies to a part of the writ. The case of *Herries v. Jamieson* was cited. But there the plea went in abatement of the writ only, and part of the declaration was not answered; and for that reason the demurrer was allowed. The first question is, Whether judgment of the whole writ is demanded in this plea? And we are unanimously of opinion that it is so demanded. Then next it comes to be considered, Whether a general writ of debt is divisible, so that it may be abated in part and remain good for the residue? The case in

the *Year. Books* 1 H. 5. 4. b. is decisive of that point; there it was actually divided. The principle is equally clear. A jointenancy of parcel shall not abate the whole writ, though the demand be of a thing entire, as of a manor. *Doctrina placitandi*, fo. 7. The next question, concerning which we had the greatest difficulty, is, Whether the party having demanded judgment that the whole writ should be abated, the Court can only abate it in part. On looking into *Rassall* I find several entries where the prayer has been for the abatement of the whole writ, and the judgment of the Court has been that the writ shall abate in part only; and I can find no instance in those entries of a prayer for the partial abatement of the writ(a). The entries alluded to are fo. 108. b. 109. a. 233 (b). There are two other entries fo. 126. (c) where the prayer is general for the abatement of the writ and the cause is applicable to one only of several Defendants, but there the parties join issue on the fact. On the part of the Plaintiff the case of *Weeks v. Peach*, *Salk.* 179. has been cited, and the *dictum* of Lord *Holt* relied on, that where a plea begins with an answer to the whole, but in truth the matter pleaded is only an answer to part of the declaration, the whole plea is naught, and the Plaintiff may demur. The plain sense of which I take to be, that the party in not answering the whole of his adversary's declaration, but leaving some part unanswered makes a discontinuance. Here the Defendant has answered every material part of the writ and declaration, by pleading to some of the counts and demanding judgment of the residue and of the writ. It follows that if the demand or petition of a plea be too large the Court may abridge it, *nam omne majus continet in se minus*; and he who demands judgment of the whole writ demands judgment of every part of it. We are therefore of opinion on these authorities that the Court may and ought to moderate the prayer of the Defendant, and the judgment must be that so much of the said writ as regards the 3d, 4th, and last counts of the Plaintiff's declaration, and also the 3d, 4th, and last counts of the Plaintiff's declaration be severally quashed, and that the Plaintiff at his peril may prosecute his suit for the residue.

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(a) In *Rassall's Entr.* fo. 255. a. ed. 1566. *Entre brevis* Assise, pl. 7. where the Tenants in a writ of entry plead Non-tenure of part of the premises in abatement, the plea concludes *Unde quoad tertiam partem illum petunt judicium de brevi, &c.*

(b) *Tit. Briefe mort.* pl. 3. *Entre brevis* Briefe, pl. 2. fo. 107. b. 108. a. 259. a. ed. 1566.

(c) *Tit. Conspiracy* count, pl. 5. fo. 124 b. ed. 1566.

1801.

May 9th.

BRIGDEN v. PARKES and Others, Executors.

The three first counts of a declaration in *assumpsit* against executors stated promises made by the testator, the 4th was for money had and received by the Defendants "as such executors as aforesaid," stating a promise to pay by them "executors as aforesaid"; and the last was upon an account stated by the Defendants "executors as aforesaid" and stating the promise to pay in the same manner. Held bad on general demurrer.

ASSUMPSIT. The two first counts of the declaration stated, that in consideration that the Plaintiff had delivered to the testator in his life-time certain hops, to be sold, the testator promised to account for them when requested. The 3d count was for money had and received by the testator in his life-time, to the use of the Plaintiff which the testator promised to pay. The 4th alleged that the Defendants were indebted for money had and received by them "as such executors as aforesaid," to the use of the Plaintiff, and "being so indebted the Defendants executors as aforesaid" promised to pay the same. The last count stated, that the Defendants "executors as aforesaid" accounted with the Plaintiff concerning divers sums of money of the Plaintiff due from the Defendants "executors as aforesaid" and upon that accounting the Defendants "executors as aforesaid" were found indebted to the Plaintiff, and in consideration thereof the Defendants "executors as aforesaid" promised to pay. To this declaration there was a general demurrer.

Bayley Serjt. in support of the demurrer contended, that if a Plaintiff in the same action seek to recover several demands, some of which accrue from the Defendant in his own right, and others in right of another, it is the subject of general demurrer, may be assigned for error, and is ground for arresting the judgment; that in the present case the causes of action stated in the 4th and last counts of the declaration appeared to have arisen after the death of the testator, and that the Defendant therefore was liable in respect of those causes of action in his own right, and was subject to a judgment *de bonis propriis*, whereas he was only liable in the right of his testator in respect of the causes of action contained in the three first counts, and no other judgment could be obtained against him than a judgment *de bonis testatoris*. He cited *Jennings v. Newman*, 4 Term Rep. 347. and *Rose v. Bowler*, 1 H. Bl. 108. as in point. He also urged that even supposing the causes of action contained in the 4th and last counts to be capable of being joined with those stated in the three first, yet that it was not sufficiently stated in the 4th and last counts, that the causes of action arose against the Defendants as executors, the promise in the 4th count being stated to have been made by the Defendants *executors as aforesaid*, not by the Defendants as such executors as aforesaid;

and in the last count both the accounting and the promise being stated in the same manner.

Shepherd Serjt. *contra* observed, that if the Defendants were liable as executors upon the causes of action stated in the 4th and last counts it could not make any difference whether it were stated that they *executors as aforesaid* or *as such executors as aforesaid* were liable. He admitted however that upon the fourth count they must be considered as liable in their own right, though according to the authority of *Secar v. Atkinson*, 1 H. Bl. 102. they might be liable as executors upon the account stated. But he urged that the mis-joinder of these several causes of action was only matter of special demurrer and ought therefore to have been specially assigned for cause: for that on a general demurrer if there be any one good count the Plaintiff is entitled to take his judgment upon that count.

But *The Court* were of opinion that it was matter of general demurrer; that it might be alleged in arrest of judgment, or assigned for error.

Leave was given to amend on payment of costs.

BURGESS v. FREELOVE.

May 9th.

TRESPASS for assault and false imprisonment. The declaration consisted of three counts, the 1st of which alleged, that the Defendant "on the 28th day of *February* 1800, and on divers other days and times between that day and the day of suing forth of the original writ at &c. assaulted the Plaintiff and beat &c. and there at and on those several days and times without any reasonable or probable cause whatsoever imprisoned him &c. and caused him to be imprisoned for a long space of time *to wit* for the space of 48 hours at and on those and each and every of those times without the leave &c."; the 2d and 3d counts alleged that "on the day and year aforesaid and on divers other days and times &c." the Defendant assaulted the Plaintiff.

The Defendant demurred specially and assigned for causes, "that the said Plaintiff hath in and by the said 1st count of the said declaration alleged that the said Defendant on the 28th of *July* 1800 and on divers other days and times between that day and the day of suing forth of the said original writ of the said Plaintiff

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Trespass for assault and false imprisonment may be laid *diversis diebus et vicibus*.

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in this behalf assaulted the said Plaintiff and beat bruised wounded and ill-treated him and at and on those several days and times imprisoned him the said Plaintiff and caused and procured him to be imprisoned and detained him in prison and caused and procured him to be kept and detained in prison for a long space of time at and on each and every of those times whereas the said Plaintiff in the said first count of the said declaration ought to have stated and alleged that the said Defendant on some one certain determined day only and not on more than one day nor as aforesaid assaulted the said Plaintiff and beat and bruised wounded and ill treated him and on that one certain and determined day only and not on more than one day nor as aforesaid imprisoned him the said Plaintiff and caused and procured him to be imprisoned and kept and detained him in prison for a long space of time and also for that the said Plaintiff hath not in or by the said 1st count of the said declaration stated or alleged that the said several trespasses therein mentioned or any of them were committed on one certain day only as he ought to have done, but on the contrary thereof hath stated and alleged, that those trespasses were committed on divers days and times And also for that the said Plaintiff hath laid and charged the said several trespasses in the said first count of the declaration mentioned under a *continuando* whereas the same and every of them ought to have been laid and charged to have been committed on one certain fixed and determinate day only and not under a *continuando* And also for that it does not in or by the said first count of the said declaration appear with certainty or precision that all or any of the said several trespasses therein supposed to have been committed by the said Defendant were committed on the said 28th day of *July* in the said first count mentioned only or on any other certain day only but that those trespasses were severally committed on divers days and times And also for that the said first count of the said declaration comprizes and includes divers distinct and separate causes of action which ought not and by law cannot be included in one and the same count And also for that the said 1st count of the said declaration is in divers and very many other respects informal" &c. To the 2d and 3d counts the causes assigned were the same, only introducing them as to each count thus "for that the said Plaintiff hath in and by the said count alleged, that the said Defendant on the day and year in that count mentioned and on divers other days and times" &c. The Plaintiff joined in demurrer.

Best Serjt. in support of the demurrer cited *Michell v. Neale et Ux. Cowp. 828.* as being precisely in point, and to an observation from the Court, that the cases cited in support of the demurrer in *Michell v. Neale* were against it, he answered, that in those cases the objection had not been taken on special demurrer. He also urged that it was impossible for the Defendant to plead to an assault laid as in the present case.

Shepherd Serjt. *contra*, observed, that the case of *Michell v. Neale* was decided on a misunderstanding of the difference between laying an assault *diversis diebus et vicibus*, and with a *continuando*.

The Court (consisting of HEATH, ROOKE and CHAMBRE Justices) were of opinion that the case of *Michell v. Neale* could not be deemed a sound authority, and referred to *Monkton v. Apsley*, 6 Mod. 38. Salk. 638. where Holt Ch. J. and Powell J. take the difference between a *continuando* and *diversis diebus et vicibus*, and shew that no inconvenience can arise to the Defendant from either mode of laying the assault, since evidence can only be given of a single act (a).

The Court gave the Defendant leave to withdraw his demurrer on payment of costs.

(a) See also on this subject the note to *The Earl of Manchester v. Vale*, 1 Saund. 24. by Mr. Serjt. Williams.

GRAY, .EXECUTOR, v. PINDAR.

May 11th.

ASSUMPSIT. The first count of the declaration was on a promissory note dated the 18th September 1783, whereby the Defendant promised to pay to the Plaintiff's testator, or his order, the sum of 80*l.* in manner following, *viz.* the sum of 5*l.* upon the 5th of April then next, the sum of other 5*l.* on the 10th of April 1784, and the like sum of 5*l.* half-yearly until the said sum of 80*l.* was fully paid and satisfied.

The second count was for interest, and there were other counts for money paid, lent, had and received, and on an account stated.

The Defendant pleaded 1st, *Non assumpsit.* 2dly, As to the said several causes of action in the said declaration mentioned, except as to the damages sustained by the Plaintiff as such executor

Assumpsit on a note payable by instalments; plea in bar as to the said several causes of action except the last instalment that "the said several causes of action did not nor did any of them accrue within six years". Held on special demurrer that though some of the instalments might be barred and others not, yet the introduction to the plea and the body of it were inconsistent.

of the instalments might be barred and others not, yet the introduction to the plea and the body of it were inconsistent.

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as aforesaid by reason of the last half-yearly payment of 5*l.* in the said first count of the said declaration mentioned, the Defendant by leave &c. says *actionem non*, because he says, that the said several causes of action in the said declaration mentioned did not, nor did any of them accrue to the Plaintiff at any time within six years next before the day of suing out the original writ of the Plaintiff And this &c. Wherefore, &c.

To this second plea the Plaintiff demurred specially, and assigned for causes, "that the introductory part of the said plea of the said Defendant by him lastly above pleaded in bar is inconsistent with and contradictory to the allegation of the said plea in this that the said plea purporting to be pleaded in bar to part only of the said several causes of action in the said declaration mentioned contains matter alleged and pleaded in bar to all of those said several causes of action; and in this that the introductory part of the said plea admits that the said *John Gray* as such executor as aforesaid hath sustained damage by reason of the non-payment of the last half-yearly payment of 5*l.* in the first count of the said declaration mentioned yet the matter alleged in the said plea is pleaded therein in bar to all the said several causes of action in the said declaration mentioned. And also that the said cause of action of the said Plaintiff in the said first count of the said declaration mentioned arises upon a promissory-note to pay the entire sum of 80*l.* in that count mentioned and a promise and undertaking of the said Defendant to pay that precise and specific sum, and that the said Defendant in and by his said last-mentioned plea admits that the said cause of action in the said first count of the said declaration mentioned did accrue to the said Plaintiff within six years next before the day of the suing out of the said original writ of the said Plaintiff. And also that the said last-mentioned plea is in various other respects insufficient, informal, vague and uncertain," &c.

Heywood Serjt. in support of the Demurrer. The contract stated in the first count of the declaration being an entire contract to pay 80*l.* no action could be maintained upon the note until all the instalments were due, and consequently as the plea admits that the statute of limitations had not run against the last instalment, it cannot bar the Plaintiff from recovering the rest. In *Hunt v. Sone*, *Cro. Eliz.* 118. which was *assumpsit* for the occupation of lands from such a day for five years under a promise to pay 20*l.* for every year at two feasts, with an averment that the Defendant

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had occupied the land for a year and a half, the Court held that if the promise had been that the Defendant should enjoy the land for five years, and in consideration thereof should pay 100*l.* in five years, *viz.* 20*l.* *per annum*, the action would not lie for part till all the term was expired. So in *Françam v. Foster, Skinn.* 326. Holt Ch. J. said, "If a man agrees to pay such a sum at three several days, here he may not declare for this sum until the days are past." [But the Court said, that it had been expressly decided of late years that an action of *assumpsit* may be maintained for each separate instalment of a debt arising upon simple contract; though no action of debt can be maintained until all the instalments are due (a).] Admitting however, that the Plaintiff might at his election have maintained an action on each instalment, yet he has a right to consider the whole sum as one entire debt, and having done so in this case, it was not competent to the Defendant to sever it. But at all events this plea is informally pleaded; for the introductory part of the plea professes to answer only a part of the declaration, whereas the body of it gives an answer to the whole. The Defendant in the former part admits that the statute of limitations does not extend to the last instalment, and yet in the latter part he states that the said several causes of action in the Declaration mentioned did not, nor did any of them accrue within six years. This is an inconsistency on the face of the plea.

Bayley Serjt. contra. The Defendant by the introductory part of his plea has confined his answer to part only of the declaration, and notwithstanding the subsequent matter which amounts to an answer to the whole declaration, the Plaintiff is entitled to judgment upon that part to which the introduction does not apply. But it does not follow, because the Defendant has introduced matter into his plea which would have afforded an answer to the whole declaration if the introduction had been equally extensive that he shall therefore be restrained from availing himself of so much of the matter pleaded as the introduction warrants. The introduction professes to answer all the causes of action in the declaration except the last instalment; the subsequent matter answers all the causes of action: it is clear therefore that it answers all those which are contained in the introduction, and if it answer any thing more that ought not to prejudice the Defendant. It is

(a) *Rudder v. Price*, 1 H. Bl. 547.

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said in *Woodward v. Robinson*, 1 Str. 303. that if a plea be pleaded as an answer to part, though in law it is an answer to the whole it is a discontinuance; but it is not said that the plea is bad (a). In the present case there can be no discontinuance since the first plea is pleaded as an answer to the whole declaration.

The Court held the plea inconsistent: but as the cause had already been tried and a verdict found for the Defendant on the general issue they gave him leave to amend without payment of costs.

(a) If a plea be pleaded as an answer to the whole, and the matter pleaded be only an answer to part, the whole plea is bad and the Plaintiff may demur. *Weeks v. Peach*, 1 Saik. 179.

May 11th. HURRY and others v. THE ROYAL EXCHANGE ASSURANCE COMPANY.

Insurance on goods from A. to B. "until they should be there discharged and safely landed;" on their arrival at B. the merchant to whom the goods belonged, employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss.

THIS was an action on a policy of assurance on ship and goods from *Petersburgh* to *London*, including the risk of boats to *Gronstadt* beginning the adventure on the said goods and merchandizes from and immediately following the loading thereof on board the said boats at *Petersburgh*, and on the ship at *Gronstadt*; to continue upon the ship until she should be arrived at *London*, and had there moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until they should be there discharged and safely landed.

The cause was tried before Lord Eldon Ch. J. at the Guildhall Sittings after last *Hilary* Term, when it appeared that the ship and cargo (consisting of hemp) arrived in safety in the river *Thames*; that the Plaintiffs being the consignees of the goods, by their broker employed and paid a lighterman belonging to one of the public lighters entered at *Waterman's Hall* to land the hemp; that the hemp was damaged on board the lighter, but without any negligence imputable to the lighterman; that it is the constant practice for merchants in the *Russian* trade to land their goods by means of lighters, and that there are no other lighters now in use among the merchants but the public lighters. A verdict was found for the Plaintiffs with liberty to the Defendants to move to have a non-suit entered on the ground of the insurance being dis-

charged by the delivery of the hemp to the lighters employed and paid by the consignees of the cargo.

Accordingly a rule *Nisi* having been obtained on a former day,

Shepherd, Heywood, and Bayley Scrjts. now shewed cause. The question is whether the damage which the goods sustained on board the lighter be one of the risks insured against by this policy? It must be admitted that if the loss had happened on board one of the ship's boats the underwriters would have been liable; it is not therefore necessary that the loss should happen on board the ship itself, but it is sufficient if it happen in the ordinary course of conveying the goods on shore. In the case of *Pelly v. The Royal Exchange Assurance Company*, 1 *Bur.* 341. the goods having been placed in a warehouse built on a sand bank in the river of *Canton* in *China* while the ship was repairing, were destroyed by fire; yet as that unloading of the goods appeared to have been in the ordinary course of the voyage, the Court held the underwriters liable; and Lord *Mansfield* there cited a case of *Tierney v. Etherington* before *Lee Ch. J.* where it was ruled that a loss happening on board a store ship at *Gibraltar* was covered by a policy containing an agreement, that upon the arrival of the ship at *Gibraltar* the goods might be unloaded and reshipped in one or more *British* ship or ships for *England* or *Holland*. The expressions of *Lee Ch. J.* were "the construction shall be according to the course of trade in this place, and this appears to be the usual mode of unloading and reshipping in this place, *viz.* that when there is no *British* ship there, then the goods are kept in store ships." Indeed the Court will attach that meaning to the words "safely landed," which the course of trade puts upon them; and Lord *Mansfield* in 1 *Bur.* 348. says, "when goods are insured *till landed* without express words, the insurance extends to the boat, the usual method of landing goods out of a ship upon the shore." It is true that the case of *Sparrow v. Carruthers*, 2 *Str.* 1236. seems to be an authority in the Defendant's favour, since it was there holden that the owner of the goods by landing them in his lighter discharged the underwriters. But with respect to that case it may be observed that it was only a *Nisi Prius* decision, that the doctrine of *Lee Ch. J.* in *Tierney v. Etherington* is inconsistent with that laid down by him in *Sparrow v. Carruthers*, that it is contradicted by a case of *Langlois v. Brant*, before *Wil-*

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les. Ch. J., and that even supposing it to be good law still it is not an authority in the present case, since as the lighter there belonged to the owner of the goods he might be considered as having taken them into his own custody, whereas the lighter in the present case was a public lighter employed in the usual course of trade. This distinction is expressly recognized by *Buller J.* in the case of *Rucker v. The London Assurance Company (a)*.

Lens

(a) *Rucker v. London Assurance Company.*

At GUILDHALL, Tuesday, 8th June 1784.

Coram Buller J.

This was an action on a policy of insurance on the *Eliza Sophia*, at and from *Granada to London*, on the ship until moored twenty-four hours, and on goods until safe discharged and landed, and the declaration stated, that before the goods, *viz.*—hogsheds of sugar, were safely discharged and landed, they by the perils of the river *Thames* and the waters thereof were washed away and lost.

The several wharfs between *London Bridge* and the *Tower* are called *Free Quays*, at which only foreign produce liable to pay duties can be landed. The owners of most of these quays entered into a partnership, which was to expire at *Leay-day* then next; and not only did the business of wharfingers, but of lightermen, employing their own lighters in discharging such vessels as were to land goods at their wharfs. The owners of some of the wharfs, not of the company, have also their own lighters, while the owners of others are not possessed of lighters of their own, but employ public lightermen. When a ship arrives in the river, the first thing that is done is to quay the ship. When a ship is quayed at a wharf belonging to one of the company, the company provides lighters and does all that is necessary for landing: when at a wharf not belonging to any of the company, the owners provide lighters, &c. All the wharfs do not keep lighters or employ the company, but employ persons having lighters but no wharf, as *Drinkall*, the person who was employed here by the Plaintiffs. It is not usual for merchants to employ lightermen, they usually leave it to the wharfinger, but *Hibbert's* house (and that only) generally employs one lighterman.

The Plaintiff applied to the agent for the company of wharfingers to land the sugars in question, but they not being able to undertake the business, and the Plaintiff fearing the ship might be kept on demurrage, one *Drinkall* who followed the business of a lighterman, was applied to by him with consent of the company. *Drinkall's* usual business was to work out rums, and he has been often employed by the company, and on this occasion was, when applied to, employed by them in working out the ship *Experiment*, but as a favour he left her to work out these sugars. *Drinkall* was a public lighterman for hire, and his lighter was numbered at *Waterman's Hall*, without which no lighter could be allowed to work. On the 30th September, fifty-seven hogsheds of sugar were put on board his lighter, and there were two men on board (which are the usual number for a lighter,) and the second mate of the ship; as she was proceeding to the shore she struck upon the anchor of a ship, and sunk through unavoidable accident, without any imputation of neglect in any body on board. The sugars were of course much damaged, and this action was brought to recover an average loss of — *per Cent.*

Bearcroft for the Defendants contended, that strictly speaking, the policy extended till the goods were landed by the ship's boats, but that the custom of trade had for convenience substituted something else, *viz.* lighters. The custom here had not been complied with: for there was an important difference in the merchant taking upon himself to employ lightermen; this was not the course of trade, and the Defendants were thereby completely discharged from the subsequent loss. A merchant may give up the custom: and the Plaintiff has done it here. In the common course of trade he could not have got discharged under a week.

"Then,"

Leas and *Best* Serjts. in support of the rule. The principle of law laid down in *Sparrow v. Carruthers* must now prevail. It seems to be settled that if the goods are received out of the ship in private lighters the underwriters are discharged. Now the only ground upon which this position can be supported is, that the possession of the goods has been altered, and the owner has taken them into his own custody. If this be the principle it can make no difference whether the lighter be publick or private: for the person who hires a public lighter for the conveyance of his own goods, makes that lighter as much his own *pro hac vice* as a pri-

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"Then," says he, "I dismiss every advantage from the custom, I discharge the underwriters for my own reasons and my own benefit." The freight is due (and it is only due when the voyage is ended,) when the goods are delivered to his lighter. If the Plaintiff's own lighter had been sent it would not have been in the course of trade, and this is in effect the same thing.

BULLER J. told the Jury, that the decision of this cause depended on the usage, but the fact of the usage once established, the question, whether the underwriter is liable or not was matter of law. But it belonged to the Jury to say whether what had been done here was or was not in the usual course of trade. There is no distinction between a public and private wharf, for a ship may go to either, and underwriters are equally liable at both. If she goes to a private wharf the public lightermen are not employed, so that there are cases in which the underwriters would be liable when the company is not employed. It is merely a voluntary society, and these lighters are not on a different footing in any respect from the rest of the lighters. If then that is not the line, what is? The line is between lighters which are public, and lighters which are the property of the merchants, and work only for them. The public lighters have a stamp of authenticity, they are entered at *Waterman's Hall*, as *Drinkall's* was, and have a public credit. The case in *Strange* (*Sparrow v. Carruthers*) does not interfere. If a merchant will not send public lighters entered at *Waterman's Hall*, it shall be a delivery to the merchant when the

goods are put on board his lighter; but not if he sends lightermen appointed by the *Waterman's Company*, and who are public officers. In the case in *Strange* the lighter is said to be the property of the Plaintiffs, and one expression of the Chief Justice is, that it would have been otherwise had the goods been sent by the ship's boat, *i. e.* the lighter of the ship employed to discharge her, for it could not be the ship's boat literally speaking, because it would be impossible it could discharge a whole cargo.

If the Jury were of this opinion, he directed them to find for the Plaintiff.

Verdict for the Plaintiff.

Mr. J. BULLER before the opening of Plaintiff's case was finished, asked if the point in the cause had not been decided several times since he attended Guildhall?

Bearcroft for the Defendants mentioned *Sparrow* and *Carruthers* as in point.

BULLER J.—This has been determined some way or other, and I think differently in two cases. If the lighter does not belong to a public company, but to the master of the goods himself, the underwriters are not liable, but if the lighterman is a public officer they are liable.

Lee for the Plaintiff cited from his own notes the case of *Langlois* and *Brant* before Lord C. J. WILLES, which was a much stronger case than *Sparrow v. Carruthers*. The policy was from *Jamaica* to — and till landed. The consignee sent his own lighter, and negligence was proved, and a special jury found against the underwriters.

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vate lighter, and the goods while on board are completely in his own custody. This case therefore does not depend upon the question whether the goods have been taken out of the usual course of the voyage, but whether the Plaintiff has not received them into his own custody before they were actually landed, and thereby discharged the underwriters from the remainder of the risk. Undoubtedly if the lighter employed in this case had been employed by the ship owner, the delivery of the goods would not have been complete until they were safely landed: but if the merchant find it inconvenient to wait for the delivery of the goods by the ship owner, but chooses to receive them into a lighter whether public or private, he by that act puts an end to the voyage. Neither in *Pelly v. The Royal Exchange Assurance Company*, nor in *Tierney v. Etherington* could it be said, that the goods had been delivered into the possession of the owners, since the loss in both cases happened in the middle of the voyage. With respect to the opinion of Mr. J. Buller in *Rucker v. The London Assurance Company*, it is to be observed that the learned Judge lays great stress on the circumstance of the lighter having been entered at *Waterman's Hall*, and considers the lighterman as a public officer, whereas that circumstance gives no publicity of character to the lighter, but only makes the owner amenable to the regulations of the Company for misconduct in the river, who is no more a public officer than a hackney coachman. As to the note which has been referred to of *Langlois v. Brant* it is not entitled to any credit, since it is there said that negligence was proved, and yet that the underwriters were held liable.

HEATH J.—The question in this case is whether the goods insured have been *safely landed* within the true intent and meaning of those words in the policy, for to every part of the policy we must give complete effect. Now, if we were to hold that the insurers were discharged by the delivery of the goods to the lighter, we should defeat the words *safely landed*, and render them altogether nugatory. It is admitted that the business of unloading the *Russian* ships is carried on by public lighters, and that no private lighters are ever employed by the merchants. Now if that be so, what effect is to be given to the words “until the goods are safely landed,” if they do not extend to the goods when on board the public lighter, for in no other manner can they be safely landed. It is true

true that the master and owners of the ship were discharged when the goods were put on board the lighter; but freight and insurance are not commensurate; the latter is far more extensive than the former. The insurance commences before the freight, for it commences when the goods are put on board the boats at *Peterburgh*, and it also continues longer than the freight, for it does not determine until the goods are safely landed. There is no pretence for saying, that if the freighter of the goods had made use of his own boats in putting the goods on board at *Gronstadt* the insurers would have been thereby discharged. It has been argued however, that whenever the custody of the goods is changed the insurance is at an end; but that argument is founded on the notion of freight and insurance being co-extensive. With respect to the case of *Sparrow v. Carruthers*, I think it ought not to be extended; it was only a *Nisi Prius* decision, it has been cited several times, but never recognized, and whenever it has been cited great pains have been taken to distinguish it from the cases before the Court, though perhaps not always with success. I do not mean however to quarrel with that decision; a case precisely similar is not likely to arise again, since it is not customary for the owners of goods to send their own lighters, but always to employ public lighters.

ROOKE J.—I am of the same opinion. The words of this policy are, that the underwriters shall continue liable until the goods are safely landed; now I think it is going too far to say, that when the goods are put on board the lighter they are safely landed. I cannot agree that this case depends on the question, who employs the lighter? It appears to me to depend upon the question, what the lighter is? For whether the lighter be employed by the owner of the goods or the owner of the ship, the landing of the goods is equally dangerous, and the risk of the underwriters the same. The criterion seems to be whether it is a public lighter, publicly registered, and in short that sort of lighter which is equally known to the underwriters and the owner of the goods. It is certainly much for the benefit of the underwriters, that this construction should prevail; since it is desirable for him that the merchant should as much as possible facilitate the landing of the goods; for the sooner they are landed, the sooner the risk of the underwriters determines. If the body of underwriters were bound to elect whether these large *Russian* ships should be un-

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loaded by means of these lighters employed by the persons interested in the goods on board, or whether the unloading should be left to the sole management of a foreign captain, who probably knows very little about the nature of public or private lighters, and who must necessarily be much longer about it, I think they would not hesitate to choose the former method as most safe. With respect to the case of *Sparrow v. Carruthers*, Mr. Justice *Buller* has expressly taken the distinction between public and private lighters, which differs that case from the present.

CHAMBRE J.—This is a case of considerable consequence in respect of the sum which depends upon it, but, of still more in respect of the general question which it involves; and if I entertained any doubts upon the subject I should wish to take time before I delivered an opinion; but having none I think the sooner we come to a decision the better. The argument for the underwriters rests entirely on the case of *Sparrow v. Carruthers*. I do not wish to shake the authority of that case, nor indeed is it necessary so to do; but I cannot but observe, that if the decision had been otherwise I should have been better satisfied. The case before Mr. Justice *Buller* has more weight with me: and particularly so, because the parties acquiesced in his determination notwithstanding they would have been armed with the authority of *Sparrow v. Carruthers* had they been inclined to bring the case before the Court. The only strong ground upon which the case of *Sparrow v. Carruthers* can be supported (if indeed it can be supported at all,) is that the owner of the goods completely accepted them, and discharged the ship owner from any further concern in them. In this case I rely on the words of the policy and the known and settled usage of trade. What can the words “until safely landed” refer to? It is admitted that it is impossible for these large vessels to come up to the wharfs in order to deliver their goods; that the merchants have no lighters of their own, and that the ships’ boats are inadequate to the purpose. In all cases therefore, the goods must be delivered by the public lighters, and we must take the underwriters to be cognizant of the usage of the trade which they insure. I do not lay much stress on the notion of these lightermen being public officers: there are many trades which are under certain regulations, such as porters, carmen, and hackney coachmen, and yet they are not public officers;

cers ; but I rely on the constant usage of trade, and on the words of the policy. 1^Q01.

Per Curiam,

Postea to the Plaintiffs.

STEEL v. ALLAN (a).

May 12th.

THIS was a rule calling on the Defendant or his attorney to shew cause why security should not be given by one of them for the costs of a writ of error on the judgment in this cause, otherwise the Plaintiff to be at liberty to proceed in the action and on the recognizance of bail notwithstanding the allowance of the writ of error. To obtain this rule an affidavit had been produced, stating all the proceedings in the action, and alleging the belief of the Plaintiff's attorneys, that there was no cause of error, the Defendant's attorneys having agreed not to assign the want of an original as cause of error, and deposing that since the commencement of the action a commission in the nature of a writ *de lunatic inquirendo* had issued, under which the Defendant had been found a lunatic and a committee had been appointed.

The Court will not compel security for costs in error on the ground of the Plaintiff in error being a lunatic.

Cockell Serjt. now shewed cause on the ground of this application being perfectly new in practice, and not supported by any principle.

Clayton Serjt. in support of the rule argued, that the estate of the lunatic would not be liable, being under the controul of the crown, and therefore the Plaintiff would be harassed without any prospect of being repaid the costs of the writ of error to which the recognizance of bail does not extend (b).

But *The Court* refused to accede to the application.

Rule discharged.

(a) *Vide ante*, p. 362.

(b) By this must be meant the recognizance of bail in the Court below, for if it had been a case in which bail in error could have been taken, it would have been otherwise.

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May 13th.

BROMLEY v. COXWELL.

A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England. Held that A. could not maintain trover against B. for the goods.

TROVER for some prints. The cause was tried before Lord Eldon Ch. J. at the *Westminster* Sittings after last *Hilary* Term, when the following facts appeared in evidence.

The Plaintiff being a printseller, and the Defendant a mate of an *East Indiaman*, in *February* 1799 the latter was intrusted by the former with some prints to be disposed of in *India* under the following agreement. “*William Bromley* agrees to send out by *James Coxwell* one hundred engravings from his plate of his Majesty on horseback under these conditions, that provided *James Coxwell* can dispose of any one or all of them at above one guinea each, he the said *James Coxwell* is to be accountable to *William Bromley* on his return to *England*, for as many as he may dispose of at one guinea each; and *William Bromley* agrees to take all or as many as may be returned by the said *James Coxwell*, provided he the said *James Coxwell* cannot sell them in *India* or at any other port he may touch at, without expecting any sum from *James Coxwell* or making any charge; and *William Bromley* further agrees to and authorizes *James Coxwell* to sell them for whatever they may fetch, if not more than one guinea may be offered for them separately.” The Defendant on his arrival at *Calcutta* not being able to obtain more than three shillings and five pence per print, at which sum he sold one only, carried the remainder to *Madras*, and there endeavoured to sell them, but with no better success, whereupon, judging for the best, he left the residue in the hands of an agent at *Madras* to be disposed of by him, directing the agent to remit the money to him in *England*, at the *Jerusalem Coffee-house*, *London*. On his arrival in *England*, he said to a third person, “I have taken upon myself to leave the prints in *India*, and I hope Mr. *Bromley* will approve of what I have done.”

The Jury found a verdict for the Plaintiff, subject to the opinion of the Court, whether under the above circumstances trover could be maintained?

A rule having been obtained for setting aside the verdict, *Best* and *Onslow* Serjts. now shewed cause and contended, that it was a general principle of law, that wherever a person takes upon himself to dispose of the goods of another without an authority so

to do, it amounts to a conversion; and that the words "to his own use," though necessary to be inserted in averring the conversion, have always received a liberal construction; that it made no difference that the goods in this case were originally bailed to the Defendant, for that the Defendant by disposing of them in a manner unauthorized by the agreement had determined the bailment, and become guilty of a conversion. They cited *Wilson v. Chambers*, *Cro. Car.* 262. where the Court said, "denying to deliver upon request is a conversion;" and *Waldgrave v. Ogden*, 1 *Leon.* 224. *Cro. Eliz.* 219. S. C. where *Walmesley J.* said, "if a man find my garments and suffereth them to be eaten with moths by the negligent keeping of them no action lieth; but if he weareth my garments it is otherwise, for the wearing is a conversion." They urged that the Plaintiff was clearly entitled to some action; that had the injury arisen from a mere non-feasance on the part of the Defendant, the proper remedy would have been an action on the case, but that the positive act of the Defendant in delivering the prints to his agent in *India* without any authority so to do was sufficient to support an action of trover. *Anon*, 2 *Salk.* 655. *Syeds v. Hay*, 4 *Term Rep.* 260. where *Buller J.* said, "If one man who is entrusted with the goods of another put them into the hands of a third person contrary to orders it is a conversion;" and *Youl v. Harbottle*, *Peake's N. P. Cas.* 49. where Lord *Kenyon* said, "I agree that when a carrier loses goods by accident, trover will not lie against him, but when he delivers them to a third person and is an actor, though under a mistake, this species of action may be maintained."

Shepherd Serjt. contra was stopped by the Court.

HEATH J.—I am not clear that in the present case there was any breach of the agreement. The Defendant does not agree to bring the prints home; he was authorized to sell them for what they might fetch if not more than one guinea should be offered for them separately: and under this part of the agreement I do not see why he was not at liberty to leave them with an agent to be sold. The conduct of the Defendant however, cannot amount to a conversion in any point of view. It is agreed that mere negligence is not sufficient: now the conduct of the Defendant in not selling the prints in *India* was a mere non-feasance. To support an action of trover there must be a positive tortious act.

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v.
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ROOKE J.—In this case there was no agreement to bring the prints home. The Defendant left them in *India* judging for the best; and though he ordered the money to be remitted to himself, it is clear that this was done with no other view than to facilitate the payment of it to the Plaintiff. At all events it does not appear to me that there was any conversion.

CHAMBRE J.—It is not necessary to decide whether any action at all could be maintained under the circumstances of this case; but the strong inclination of my opinion is, that none could be maintained. The Defendant agrees to send some prints to *India*, and if they are sold for more than one guinea each, the Defendant is only to account for them at that sum. Then the Plaintiff agrees to take all which shall be returned without any charge to the Defendant: none are returned. The agreement concludes with a general authority, in case the prints do not sell for a guinea each, to sell them for whatever they may fetch. The Defendant not being able to sell them at a guinea, leaves them with an agent to be sold to the best advantage. It does not appear, that any have been sold. No act has been done. The agreement does not express that the Defendant shall sell the goods himself: it seems therefore that the delivery to his agent was within the terms of the agreement.

Per Curiam,

Rule absolute for entering a nonsuit.

May 13th.

PERKINS, Administrator, v. PETTIT and YALE.

If a Defendant in error, (the Plaintiff in the action) upon judgment being affirmed take in execution the body of the Plaintiff in error for the debt damages and costs in error, he does not thereby discharge the bail in error; but may sue them upon their recog-

SCIRE FACIAS on a recognizance of bail in error. The Defendants pleaded 1st, *Nul tiel record* of the recognizance. 2dly, *Nul tiel record* of the writ of *Scire facias* and return. 3dly, *Executionem non* “because they say that to the said supposed recognizance a certain condition was underwritten which condition (reciting that the Plaintiff had lately in his Majesty’s Court of *Common Bench* at *Westminster* before Sir *James Eyre* Knight and his Brethren Justices of the said Court by the consideration and judgment of the said Court recovered against *Jane Howes* a certain debt of 360 l. and also 27 l. 3 s. 6 d. for his damages which he had sustained by occasion of the detaining that debt whereof the said *Jane Howes* had been convicted and that the said *Jane* had sued out

out of his Majesty's Court of *Chancery* at *Westminster* on the said judgment his Majesty's writ of Error tested the 19th day of *May* in the 38th year of his reign directed to Sir *James Eyre* Knight Chief Justice of his Majesty's Court of the *Bench* aforesaid) was, that if the said *Jane Howes* should by herself or her sufficient security prosecute the said writ of Error with effect and also should satisfy and pay unto the said Plaintiff (if the said judgment should be affirmed or the said writ of Error should be discontinued in her default or she should be nonsuited therein) the debt and damages aforesaid then already adjudged upon the said judgment and all costs and damages to be also awarded for the delay of execution of the said judgment by means of the said writ of Error then that recognizance should be void and of no effect or else should remain in full force and virtue as by the said condition of the said recognizance remaining of record in the said Court of our said Lord the King of the *Bench* may more fully appear And the said Defendants further say that afterwards to wit in *Michaelmas* Term in the 39th year of the reign of our Lord the King the said judgment was in all things affirmed by the Court of our Lord the King before the King himself the same Court then and still being at *Westminster* aforesaid in the said county of *Middlesex* and by the same Court a large sum of money to wit the sum of 16 *l.* 10s. was adjudged to the said *John* according to the form of the statute in such case made and provided for his damages costs and charges which he had by occasion of the delay of the execution aforesaid by the pretence of the prosecution of the said writ of Error as by record of the said Judgment of Affirmance still remaining in the same Court at *Westminster* aforesaid may more fully appear And the said Plaintiff afterwards and before the suing forth of the said supposed writs of *Scire facias* or either of them to wit on 8^c at 8^c sued and prosecuted out of the said Court of our Lord the King before the King himself the same Court then and still being at *Westminster* aforesaid on the said judgment of affirmance a certain writ of our Lord the King of *Capias ad satisfaciendum* against the said *Jane Howes* directed to the Sheriff of *Middlesex* whereby the said Sheriff was commanded that he should take the said *Jane* if she should be found in his bailiwick and her safely keep so that he might have her body before our said Lord the King on the Morrow of *All Souls* then next following wheresoever he should then be in *England* to satisfy the said *John* as well the said debt of

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360*l.* as also the said 27*l.* 3*s.* 6*d.* for his damages which he had sustained by occasion of the detaining that debt and also the said 16*l.* 10*s.* for his damages costs and charges which he had by occasion of the delay of the execution of the judgment aforesaid by the pretence of the prosecution of the said writ of Error brought by the said *Jane* against the said Plaintiff and upon the premises aforesaid which writ after the issuing and before the return thereof to wit on *Et* at *Et* was duly delivered to *Charles Price* Esquire and *Peter Mellish* Esquire then being Sheriff of the same County to be executed in due form of law and the said Sheriff by virtue of the said writ afterwards and before the return thereof and before the suing out of the said writ of *Scire facias* or either of them to wit on *Et* at *Et* took and arrested the said *Jane* by her body and had and detained her in his custody in execution at the suit of the said Plaintiff for the cause aforesaid for a long space of time to wit from that time until the suing forth of the said supposed writs of *Scire facias* and from thenceforth hitherto. And this &c. whereforeⁿ &c.

Issue was joined on the two first pleas: and a general demurrer put in to the last.

Marshall Serjt. was to have argued in support of the demurrer; but *Shepherd* Serjt. being called upon by the Court to support the plea, said that he meant to contend that the condition of the recognizance was satisfied by the Plaintiff in error being taken in execution for the original debt and costs together with the costs of the writ of error; and mentioned the cases of *Vigers v. Aldrich*, 4 *Burr.* 2482, and *Clarke v. Clement*, 6 *Term Rep.* 525 (a).

But the Court (consisting of *HEATH*, *ROOKE*, and *CHAMBRE*, Js.) were clearly of opinion that it was not an arguable point.

Judgment for the Plaintiff (b).

(a) See also *Jaques v. Withy*, 1 *Term Rep.* 557. and *Tanner v. Hague*, 7 *Term Rep.* 420. } the principal become bankrupt pending the writ of Error. *Southcott v. Braithwaite*, 1 *Term Rep.* 624.
 (b) So bail in error cannot be relieved if

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DIXON v. DIXON.

May 16th.

THIS was an action of debt on a bond for 4000 *l.* conditioned for the payment of 2000 *l.* A verdict having been found for the Plaintiff with one shilling damages for the detention of the debt, judgment was entered up for 4019 *l.* 11 *s.* 0 *d.* being the amount of the penalty with the addition of 1 *s.* damages and 19 *l.* 10 *s.* costs. Upon this judgment the Defendant brought a writ of error, and a recognizance was entered into by two persons as his sureties binding each of them in the sum of 4000 *l.* Notwithstanding this writ of error the Plaintiff sued out a *Fieri facias* indorsed to levy 2119 *l.* 11 *s.* being the amount of the sum mentioned in the condition together with the damages and costs added to 100 *l.* due by way of interest.

A rule *nisi* having been obtained for setting aside this execution on the ground of its having issued pending a writ of error.

Best and *Praed* Serjts. now shewed cause, and objected to the recognizance upon two grounds, first, because the Defendant himself had not entered into it together with his sureties; secondly, because it was not taken in a proper sum. They relied upon the words of the statute 3 *Jac.* 1. c. 8. which provides that no execution shall be stayed upon any writ of Error for the reversing of any judgment given upon any obligation with condition for the payment of money only "unless such person or persons in whose names such writ of Error shall be brought with two sufficient sureties such as the Court shall allow of shall first before such stay made be bound unto the party for whom any such judgment shall be given by recognizance in double the sum adjudged to be recovered by such former judgment to prosecute the said writ of Error with effect and also to satisfy and pay the debts damages and costs adjudged upon the former judgment and all costs and damages to be awarded for the same delaying of execution." With respect to the first point they contended that as the words of the statute were positive that the plaintiff in Error shall enter into the recognizance with two sureties, no length of practice to the contrary would authorise the Court to consider those words satisfied by a recognizance entered into by two sureties without the Plaintiff in Error; and that the cases of *Barnes v. Bulwer*, *Carth.* 121. *Goodtitle v. Bennington*, *Barnes* 75. and *Lushington v. Doe*, *Barnes* 78. where recognizances entered

A recognizance entered into by the bail in error without the principal is good.

If on a bond debt double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error it is sufficient; though a further sum be due for interest and costs and nominal damages have been recovered.

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into by sureties only were held sufficient were all cases of ejectment, which do not depend on the statute of *Jac. 1*, but on 16 and 17 *Car. 2. c. 8. s. 3.* which is differently worded from the former statute as it only requires the Plaintiff in Error to be bound without specifying whether with or without sureties. On the 2d point they urged that as the statute requires that the parties to the recognizance shall be bound in double the sum adjudged, the recognizance in this case ought to have been taken in double the sum of 4019 *l. 10s.* and they referred to a manuscript note (a) of one of the officers of the Court; or that even supposing according to the case of *Moor v. Lynch*, 1 *Wils.* 213. it was sufficient to take the recognizance in double the debt really due, still the interest ought to have been added to the sum mentioned in the condition, which then would amount to 2100 *l.*

Shepherd and *Bayley* Serjts. *contra* as to both points relied on the invariable practice of the Court as well as on the cases referred to by the other side, which they insisted must govern the present.

The Court (consisting of *Heath*, *Rooke*, and *Chambre, Js.*) were of opinion that as the practice had so long prevailed without objection it was now too late to overturn it; and that with respect to the 1st point they might without doing much violence to the statute construe the words *with sureties* to mean *by sureties*.

Rule absolute.

(a) *Anon.* May 8th, 1796. Action on bond for money payable by instalments; judgment obtained and a writ of Error brought thereon; bail in error was only put in for double the sum due, whereupon an application was made to set aside the execution which had issued notwithstanding the writ of Error and bail put in, merely because the bail were not bound in double the penalty of the bond.—

Per Curiam. There having been a failure of payment of the instalments the judgment is regular for the whole penalty and under the statute 3 *Jac. 1. c. 8.* the bail in error should have been for double the penalty and this application would have been more proper had it been to stay all proceedings on payment of the instalments due and all the costs.

May 16th.

SOILLEUX v. HERBST (a).

If a bond of submission to arbitration between the trustee of a

wife and her husband recite that a suit for separation has been instituted between the husband and wife in the Commons, and that in order to put an end to any contest about the terms of the separation it has been agreed that all matters should be referred to *J. S.* and either of the parties should be "at liberty to apply to the Court" to make the "award a rule of Court," such submission may be made a rule of the Court of Common Pleas under the 9 and 10 *W. 3.*

(a) All the affidavits were by mistake entitled in this manner, though no cause was pending in the Court.

Herbst

Herbst the obligor was trusted for the wife of *Soilleux* the obligee. The bond recited that *Mary Soilleux* wife of *John Soilleux*; had lately instituted her suit and complaint in the Ecclesiastical Court at *Doctors' Commons*, for a separation and divorce *a mensâ et thoro*, and in order to prevent further contest, controversy, litigation, and disputes whatsoever, as well touching the terms on which such divorce should be had, as also to terminate and put a final end and determination to the said suit, and to any doubt, question, contest, and dispute, which might arise in respect of the children of the said marriage, it had been proposed by the said *John Soilleux*, and agreed to by the said *Mary Soilleux*, that the terms of such separation, and all matters in contest and dispute between them should be left to the consideration, judgment, arbitration, final determination, and award of *J. S. W. &c.* and it was agreed, that either of the said parties submitting should be at liberty to apply to the Court for making the said award a rule of Court. The bond was conditioned for the performance of the award by the said *Mary Soilleux*.

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SOILLEUX
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Lens Serjt. shewed cause and objected 1st, that in the recital of the bond it was not specified to what Court the application should be made, and that from the expression "the Court," it could not be understood to be the intention of the parties that the application should be made to this Court. 2dly, That the agreement being, that either of the parties might apply to have the award made a rule of Court, would not authorize them to apply to have the submission made a rule of Court; for which he cited *Harrison v. Gundry*, 2 Str. 1178, as in point (a); 3dly, that as the matter of dispute between the parties was only the subject of a suit in the Ecclesiastical Court, the statute of 9 and 10 W. 3. c. 15. gave no authority to this Court to make the bond of submission a rule of Court, the statute being expressly confined to "controversies, suits, and quarrels, for which there is no other remedy but by personal action or suit in equity."

The Court (consisting of *Heath*, *Rooke*, and *Chambre*, Js.) overruled all the objections, and observed as to the first, that by the words of the statute, the parties are at liberty to make the submission "a rule of any of His Majesty's Courts of record, which they shall choose" and therefore the words used in the bond

(a) Vide also *Anon.* 2 Barnard 163. *Runnington Serjt. amicus curiæ* said, the case of *Gundry v. Harrison* had been often overruled.

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v.
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were sufficient. As to the second objection they were of opinion, that the case of *Gundry v. Harrison* was intitled to very little credit, and as to the 3d, that the obligor being trustee for the wife of the obligee, many causes of action at law, and many suits in equity might arise out of the disputes stated in the recital of the bond.

Rule absolute.

May 18th.

MOODY, Assignee of the Sheriff v. PHEASANT.

Final judgment may be entered upon a bail-bond without executing a writ of inquiry.

BAYLER Serjt. applied to the Court for leave to enter up final judgment upon a bail bond, without executing a writ of inquiry, observing that although the practice had been otherwise, the Court of *King's Bench* had of late decided, that a writ of inquiry was unnecessary in such cases.

The Court (consisting of *Heath, Rooke, and Chamber Js.*) being of the same opinion, gave leave to enter up final judgment accordingly.

May 18th.

BELL v. DA COSTA.

A Defendant who is under terms to plead issuably is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon a general demurrer. Plaintiff declared against the Defendant as ac-

ASSUMPSIT on a bill of exchange against the acceptor. The declaration described the bill to be payable to certain persons using the firm of Messrs. *M^r Brair, Watson, and Co.* and averred, that the said persons so using the firm of Messrs. *M^r Brair, Watson, and Co.* as aforesaid, indorsed it to the Plaintiff. Plea, that before the indorsement, the said Messrs. *M^r Brair, Watson, and Co.* took and accepted two other bills in full satisfaction. The Plaintiff replied, that the said persons so as aforesaid using the firm of Messrs. *M^r Brair, and Co.* did not accept the said bills in satisfaction, &c. concluded to the country, and added the *similiter*. The Defendant struck out the *similiter*, and put in a special demurrer, assigning for causes, that the Defendant inceptor of a bill of exchange, payable to certain persons using the firm of Messrs. *M^r Brair, Watson, and Co.* Defendant pleaded, that the said Messrs. *M^r Brair, Watson, and Co.* had accepted satisfaction. Plaintiff replied, that the said person so as aforesaid, using the firm of Messrs. *M^r Brair, and Co.* (leaving out the name of *Watson*,) did not accept satisfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on special demurrer.

his

his plea had averred, that the said Messrs. *M^cBrair, Watfon, and Co.* had taken and accepted bills of exchange, and that the Plaintiff in his replication alleged, that the said persons so as aforesaid using the firm of Messrs. *M^cBrair, and Co.* did not take and accept them, that the Plaintiff had not tendered any averment on which issue could be taken by the Defendant without departure from his plea, and that the Plaintiff had attempted to put in issue a subject matter foreign to the Defendant's plea.

A rule having been obtained calling upon the Defendant to shew cause why the Plaintiff should not be at liberty to proceed to the trial of the issue, notwithstanding the demurrer put in by the Defendant, on the ground of the latter having been under terms to plead issuably, rejoin gratis, and take short notice of trial,

Best Serjt. shewed cause and contended, that the terms imposed did not oblige the Defendant to wave any good ground of demurrer, but only not to demur for delay, and cited the case of *Dewey v. Sopp*, 2 *Str.* 1185.

Shepherd and Bayley Serjts. contra cited *Berry v. Anderson*, 7 *Term Rep.* 530. (a) where a special demurrer was held not to be an issuable plea, as not going to the merits, and the party demurring was compelled to strike out the special causes of demurrer.

The Court (consisting of *Heath, Rooke, and Chambre, Js.*) said the true question in these cases was, whether the objections were such as might be relied on upon a general demurrer, and accordingly made the rule absolute without payment of costs, at the same time giving the Plaintiff leave to amend without payment of costs.

(a) See also the cases there cited *in notis.*

WATERHOUSE v. SKINNER.

May 18th.

ASSUMPSIT. The declaration stated that the Plaintiff, at the instance and request of the Defendant, bargained with the Defendant to buy of him, and the Defendant agreed to sell to the Plaintiff a quantity of oats at the price of 21 shillings per quarter, to be delivered any time between *Michaelmas* day 1799 and *Lady* day 1800: and in consideration thereof the Plaintiff under-

If *A.* agree to buy of *B.* and *B.* to sell to *A.* goods at a certain price, to be delivered between such a day and such a day; and *B.* is to

to deliver the goods within the time, it is sufficient for *A.* in declaring upon the contract to aver, that he was during all the time, and still is ready and willing to receive and pay for the goods; without making any allegation of an actual tender and refusal.

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took to accept and receive the oats, and pay for them at the above mentioned price, and the Defendant undertook to deliver them some time between the above-mentioned days; "and although the said Defendant afterwards, to wit on, &c. at, &c. did in part performance of his said promise deliver to the Plaintiff a part, to wit, five quarters of the said oats, and although the time for the delivery of the residue of the said oats to the said Plaintiff according to the Defendant's promise aforesaid is long since elapsed, and the Plaintiff was for and during all that time, and still is ready and willing to accept and receive the residue of the said oats, and to pay for the same at the rate or price aforesaid, to wit at, &c." Yet Defendant not regarding, &c. had not delivered, &c. but had refused, &c. The Defendant pleaded *non-assumpsit*, and a verdict having been found for the Plaintiff, a rule *Nisi* was obtained in *Michaelmas* Term last, calling upon him to shew cause why judgment should not be arrested, because it was not averred in the declaration, that he had performed his part of the contract by tendering the price of the corn.

Shepherd and *Best* Serjts. shewed cause; and distinguished this case from that of *Morton v. Lamb*, 7 *Term Rep.* 125. by observing, that in that case there was no averment of the Plaintiff's readiness to receive and pay for the corn; which is all that is necessary to support the action, as appears from the words of Lord *Kenyon* in *Morton v. Lamb*, that "where two concurrent acts are to be done, the party who sues the other for non-performance must aver, that he has performed, or was ready to perform his part of the contract."

Marshall Serjt. in support of the rule contended, that the meaning of the contract was, that the money should be paid on the delivery of the corn; that the payment and delivery therefore were concurrent acts, and consequently that neither party could maintain an action against the other without averring performance on his part, or a tender and refusal; that the averment in this declaration of the Plaintiff's readiness to pay was introduced in order to avoid the necessity of proving an actual tender, without which the Plaintiff was not entitled to maintain his action. He cited *Callonel v. Briggs*, 1 *Salk.* 112. and *Pordage v. Cole*, 1 *Saund.* 320 (a).

Cur. adv. vult.

(a) See the edition of *Saunders* by Mr. Serjt. *Williams*, where in note 4 to the above case the learning upon this subject is very fully collected and commented upon.

On this day the opinion of the *Court* (present *Rooke* and *Chambre, Js.*) was delivered by

HEATH J.—The only doubt which we entertained on this case arose from the decision of the *Court of King's Bench* in *Morton v. Lamb*. But that decision has been explained by the subsequent case of *Rawson v. Johnson*; 1 *East*. 203. where in a declaration on a contract similar to the present an averment of the Plaintiff's readiness and willingness to pay for the article to be delivered by the Defendant, without any allegation of an actual tender of the money was held sufficient. With the determination of this last case we are perfectly satisfied, and therefore think, that the judgment ought not to be arrested.

Per Curiam,

Rule discharged.

THE END OF EASTER TERM.

SHORTLY after the close of the term, *Lord Eldon*, who had continued to hold the office of Lord Chief Justice of this Court, together with that of Lord High Chancellor, and had occasionally presided here in order to make his Report on motions for new trials where the causes had been tried before him, resigned the former situation.

The Right Honourable Sir *Richard Pepper Arden*, Knight, (having resigned the situation of Master of the Rolls,) was appointed to succeed him, and was created a peer by the title of Baron *Alvanley* of *Alvanley* in the county palatine of *Chester*.

Sir *William Grant*, Knight, succeeded Lord *Alvanley* as Master of the Rolls, and was sworn of His Majesty's Most Honourable Privy Council.

In *Hilary Term* last *William Mackworth Praed*, of *Lincoln's Inn*, Esquire, was called to the degree of Serjeant at Law. His motto was "*foederis æquas dicamus leges.*"

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WATER-
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v.

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C A S E S

ARGUED and DETERMINED

1801.

IN THE

Court of COMMON PLEAS,

In the EXCHEQUER CHAMBER,

AND

In the HOUSE OF LORDS,

IN

Trinity Term,

In the Forty-first Year of the Reign of GEORGE III.

PARRY v. FRAME.

June 8th.

TROVER for an indenture of lease.

The Defendant having agreed to purchase of the Plaintiff for 75*l.* the remainder of a term of twenty years in a house, whereof eight years were unexpired, the latter delivered up to him the indenture of lease for the purpose of enabling him to get an assignment made out, and also the key of the house. After this the Defendant having made a bargain with the original landlord for an enlargement of the term, and having some dispute with the Plaintiff respecting certain fixtures which the Plaintiff's undertenant had taken off the premises, refused to pay the full price agreed upon, claiming to make a deduction for the articles taken away; and also declined to accept an assignment of the term from the Plaintiff, alleging that it was rendered unnecessary by his subsequent bargain with the original landlord. Upon this the Plaintiff required that the lease should be returned, which was refused: but

A. having agreed to purchase of *B.* the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out; *A.* then obtained an enlargement of the term from the original landlord and refused to accept an assignment or pay the full price agreed on, because *B.*'s undertenant had removed

some fixtures. Held that *B.* might insist on *A.* accepting the assignment, and after demand and refusal of the lease might maintain trover for it.

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 {
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no demand was ever made of the purchase-money. It appearing at the trial before *Chambre J.* at the Sittings after last *Easter Term*, that the Defendant at the time of the agreement being entered into with the Plaintiff was aware that the undertenant was to take away the fixtures in dispute, but that the Plaintiff had also taken away some articles to which he had no right, the Jury deducted the amount of the latter articles from the price agreed upon, and found a verdict for 73 *l.* 19 *s.*

Clayton Serjt. now moved for a Rule, calling on the Plaintiff to shew cause why a nonsuit should not be entered, contending, that under the circumstances of this case trover was not maintainable, for that the Defendant had an interest in the lease, and a lien upon it; that although a legal assignment of the lease had not actually been made, yet that a court of equity would have enforced the Defendant's title to it, by compelling a specific performance of the agreement between the parties; that the Defendant therefore having an equitable title to the lease could not be guilty of a conversion by retaining it; and that the two circumstances which are necessary to support an action of trover did not concur in this Plaintiff, namely the right of property and the right of possession. He cited *Gordon v. Harper*, 7 *Term Rep.* 9.

But *the Court* was of opinion that although the Defendant on payment of the purchase money and taking an assignment would be entitled to retain possession of the indenture of lease, yet that the Plaintiff had a right to insist upon an assignment being made out with covenants to protect himself, and that therefore, as the Defendant had refused to accept an assignment or return the lease, the action of trover was maintainable.

Clayton took nothing by his motion.

June 9th.

WADDINGTON and Others v. BRISTOW and Others
 Executors of SIMMONS.

A written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered

in packets at a certain place, cannot be given in evidence unless stamped with an agreement stamp: such an agreement not being within the exception in the 23 *Geo. 3. c. 58. s. 4.* respecting agreements for the sale of goods, wares, and merchandises.

ASSUMPSIT. The declaration stated that the testator in his lifetime was possessed of twenty-two acres of land, situate, &c. on which said land certain hops were then growing, and that the said testator being so possessed thereof, the Plaintiffs bargained for and agreed to buy of the said testator, and the said testator agreed

to sell to the said Plaintiffs all the hops then growing on the said land at the rate of 10*l.* per hundred weight, to be therefore paid by the Plaintiffs to the said testator, and to be delivered in pockets by the said testator to the Plaintiffs at *W.* in the county of *Kent*, and in consideration thereof and also in consideration that the Plaintiffs had undertaken to accept and pay for the hops at the rate aforesaid, the testator undertook to deliver the hops to the Plaintiffs at the place and in the manner aforesaid in a reasonable time next after the same should be pulled and gathered; that the hops were afterwards pulled and gathered and amounted to two hundred weight, and that although a reasonable time had elapsed and the Plaintiffs were willing to receive them, yet that neither the testator nor the Defendants had delivered them. There was a second count only varying from the first by stating, that the testator agreed to sell to the Plaintiffs all the hops then growing on twenty-two acres of land of the testator, without saying where the land was situate. The Defendants pleaded the general issue.

This cause was tried before *Hotbam* Baron, at the *Maidstone* Spring Assizes, when the following agreement was produced on the part of the Plaintiffs: "Agreed this 13th of *November* 1799 to give the undermentioned gentlemen at the rate of 10*l.* per 100 weight, for the quantities of hops as attached to their respective names, to be in pockets and delivered at *Whitstable*.

(Signed) *Henry Simmons*.

Wm. Francis, &c. &c.

(Here followed several other signatures.)

Wm. Francis, all his growth about 23 acres.

Henry Simmons, do. 22.

(Here followed several names with their respective quantities.)

(Signed) *Sam. Ferrand, Waddington, and Co."*

It was proved that it was customary in *Kent* for purchasers of hops to enter into agreements while the hops are growing for the delivery at a future time, and that when no particular time is specified in such agreements for the delivery, it is understood to be within a reasonable time after the hops are picked and dried. On the production of the above agreement it was objected that it could not be received in evidence inasmuch as it was not stamped, and the learned Judge being of that opinion, the Plaintiffs were nonsuited.

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A rule *nisi* for setting aside the nonsuit having been obtained in the course of last term,

Runnington Serjt. was proceeding on this day to shew cause, contending that the agreement in question fell within the words of the 23 *Geo. 3. c. 58. s. 1.* which imposes a duty upon every piece of paper upon which any agreement shall be written, whether the same shall be only the evidence of the contract, or obligatory upon the parties from being a written instrument, and that it did not fall within the exception in the 4th section of the same act respecting agreements made for or relating to the sale of any goods, wares, or merchandises; when the other side was called upon by the Court to support the rule.

Accordingly *Shepherd* Serjt. argued that the agreement in question fell within the exception in the 4th section of the act; for that although the quantity of hops to be delivered was measured by the number of acres in the possession of the Defendant's testator, yet that the hops at the time of the delivery were to be in the condition of goods, wares, and merchandises; that this case was not like an agreement for the sale of corn standing on the ground where the purchaser is to reap the corn, since the subject matter of the contract in that case cannot be considered as goods, wares, and merchandises, at the time when it comes into the possession of the purchaser, whereas in the present instance it would have been a breach of the contract, if the seller had omitted to deliver them in the condition of goods, wares, and merchandises, that is, gathered, dried, and pocketed; that the circumstance of the agreement being made before the goods were in *esse*, could not take it out of the exception, for that if such were its effect, every agreement to deliver any article of what kind soever at a future time, where the article is not in existence at the time of the contract, must also be deemed not within the exceptions; as if a wine-merchant should undertake to deliver a certain quantity of wine in the ensuing year of the vintage of the current year.

Lord ALVANLEY Ch. J.—By this contract the Defendant's testator undertook to sell to the Plaintiffs the whole produce of twenty-two acres in his possession, and if he had sold one bushel to any other person he would have been liable to an action. He agreed to sell the whole produce of the land in a certain state: the first term of the agreement is, that he will sell the whole produce of the land, and the second, that it shall be in a certain state at the time of delivery.

delivery. It is therefore an agreement for the sale of goods, wares, and merchandise, and something more. I think the agreement is not within the exception of the statute.

HEATH J.—It appears to me that the subject-matter of this agreement must be taken with reference to the time at which the contract was made. Now at that time the hops did not exist in the state of goods, wares, and merchandise.

ROOKE J.—The object of the Legislature in introducing the exception of the 4th section was to prevent the duty which had been imposed by the 1st section upon all agreements generally, from impeding ordinary commercial transactions. But the subject of the present agreement is a speculative bargain relative to things not *in esse* at the time when the contract was made. It does not appear to me therefore to fall within the meaning of the exception.

CHAMBER J.—There is a little ambiguity in the terms of this agreement, but that has been cleared up by the parol testimony. Indeed the declaration puts the matter beyond all doubt, for it states the contract to be for the specific produce of twenty-two acres of land alleged to be in the possession of the vendor. Now the statute only exempts contracts for the sale of goods, wares, and merchandises. But this contract gives the vendee an interest in the whole produce of that part of the vendor's farm, which consists of hop-grounds. If the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. Though I admit that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exemption of the act, notwithstanding the hops were not in the state of goods, wares, and merchandises, at the time of the contract made, yet I cannot think the present agreement within that exemption, since it gives an interest to the vendee in the produce of the vendor's land.

Rule discharged.

Ex parte MOTLEY *et* Uxor.

June 11th.

WILLIAMS Serjt. applied to the Court to amend a fine by altering the surnames of the Deforcians in the writs of covenant and dedimus potestatem, and in the præcipe and concord acknowledged

the surnames of the Deforcians, though it was sworn that a wrong name had been inserted by mistake.

The Court refused to amend a fine, passed two years back, by altering

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by them, and at the several offices through which they had passed, from *Wood* to *Motley*; and that the chirographer should be ordered to deliver up such writs, &c. for the above purpose. He made this application upon an affidavit of the attorney who was employed to pass the fine in the year 1798, and of the Deforciantes themselves, the former of whom stated, that at the time he was employed to pass the fine, and through the whole of the transaction, he understood the names of the Deforciantes to be *Wood*, and accordingly inserted that name instead of *Motley*, which he now found to be their real names, in the writ of covenant, and that they being illiterate persons only put their mark, and did not discover the mistake; and the deforciantes stated that the fine was read over to them, and they understood it, but did not discover the mistake which had been made with respect to their names.

Lord ALVANLEY Ch. J.—This is an application to amend a fine, by inserting the names of *Motley* and wife instead of *Wood* and wife. It is not sworn that the parties at the time the fine was passed were as well known by one name as the other, or even that they were known by the name of *Wood* at all; and we are desired to make the amendment without any reason given why one name was put for the other. The consequences of such an amendment must be obvious to every body. Suppose an ejectment brought, and a search made for a fine and none found; and then when the parties come to trial a fine is produced which escaped the search, because the name has been changed. These amendments ought not to be made, except in cases where the alteration is of such a nature as that no one can be misled by it. Indeed I will go further and say, that if the Court of *Common Pleas* had allowed such an amendment as is now applied for, I, as Master of the Rolls, would not have granted a new writ of covenant.

The other Judges concurring,

Williams took nothing by his motion (a).

(a) Vide *Croft v. Pead*, ante, vol. i. p. 137. and the cases there cited: also *Pearson v. Pearson*, 1 H. Bl. 73. *Wynne v. Wynne*, 7 Mod. 492. 506. *Wheeler v. Hill*, 10th. Mich. T. Nov. 24. *Dorset v. Lloyd*, 7th. Mich. T. Nov. 26, and *Milbank v. Jelfre*, cited, *ibid.* in notes.

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MILLS and Others v. BALL.

June 12th.

THIS was an action of trover for one cask of madder and one chest of indigo; to which the Defendant pleaded the general issue. The cause came on to be tried before Lord Eldon Ch. J. at the Sittings at Guildhall after last Hilary Term, when a verdict was entered for the Plaintiffs with 111*l.* 7*s.* 3*d.* damages, and 40*s.* costs, subject to the opinion of this Court upon the following case: *Josias Gard* a trader of *North Tawton*, in the county of *Devon*, about twenty-five miles from *Exeter*, on the 4th of *July* 1799, by letter to the Plaintiffs, who were dry salters in *London*, ordered the goods which were the subject of this action to be sent to him. The Plaintiffs accordingly on the 6th of *July* 1799 sent the goods, which were of the value of 111*l.* 7*s.* 3*d.* by the ship *Lively*, consigned to *Gard*, and sent a letter of advice to him inclosing the invoice, dated the 6th of *July* 1799, which letter *Gard* received in course, and the goods on their arrival at *Exeter* were delivered to the Defendant, who was a wharfinger there and received them on *Gard*'s account, and paid the freight and charges with which he debited *Gard*, and if any accident had happened to the goods before the receipt of the following letter the Plaintiffs would have called on *Gard* for payment. On the 16th *September* 1799, soon after their arrival, *Gard* wrote the following letter to the Plaintiffs Messrs. *Smith, Mills, Berkett, and Co. Northtawton, 16th September* 1799. "Sirs,—As some disagreeable matters have recently taken place in my concerns, I have thought proper to leave the madder and *East India* indigo which I lately gave you an order for on your account. It is arrived safe at *Exeter*, so you will please to sell the same to any of your correspondents there, as I would wish to do by you as I would wish to have done by myself. I am very truly, Sirs, your obedient servant, *Josias Gard*. The goods are at the wharfingers' office, marked *Lively, R. Mather*." In consequence of this letter the Plaintiffs wrote to their agent at *Exeter* to stop the goods in the possession of the Defendant, and on the 20th of *September* the Plaintiffs' agent went to the Defendant, in whose warehouse the goods then were, and tendered him

A. living at *N. in Devonshire*, ordered goods of *B.* in *London*, who lent them by ship *via Exeter*, consigned to *A.* and advised him thereof. On their arrival at *Exeter* they were delivered to *C.* a wharfinger, who received them on *A.*'s account, and paid the freight and charges; after their arrival *A.* wrote to *B.* informing that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at *Exeter*; at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt. *B.* applied to *C.* for the goods, and tendered him the freight and charges due; upon which *C.* promised not to deliver them out of his custody, but afterwards did deliver them to the assignees

of *A.* though indemnified by *B.* Held 1st, that *B.* had a right to stop the goods in the hands of *C.*; and 2dly, that he might maintain trover for them against *C.*

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his freight and charges and demanded the goods on the behalf of the Plaintiffs. The Defendant said (as the fact was) that some of *Gard's* creditors had been there before to demand them, but he had refused to deliver them, hearing that *Gard* had stopped payment. He then promised not to deliver them out of his custody till he was certain of a safe delivery. On the 2d of *October* the demand was repeated by the Plaintiffs' agent and a bond of indemnity left with the Defendant to indemnify him against any claim that might be made from any other person. On the 23d of *September* a commission of bankrupt issued against *Gard*, who was subject to the bankrupt laws, indebted to the petitioning creditors in a sum sufficient to support the commission, and had committed an act of bankruptcy on the 8th of *September* 1799. On the 1st of *October* 1799 he was duly declared a bankrupt, and on the 19th of *October* 1799 assignees of his effects and estate were duly chosen and an assignment executed. On the 3d of *November* the Defendant delivered the goods to the assignees, who sold them for 103*l.* 7*s.*; the charges amounted to 3*l.* 19*s.* The questions for the opinion of the Court were, whether the Plaintiffs were entitled to recover? and if they were, what damages? whether 111*l.* 7*s.* 3*d.* or 103*l.* 7*s.*, or 99*l.* 17*s.*? If the Court should be of opinion with the Plaintiffs, the verdict to stand for such sum as they should direct; if for the Defendant, a nonsuit to be entered.

Best Serjt. for the Plaintiffs. The question is, whether the Plaintiffs under the circumstances of this case were entitled to stop the goods *in transitu*? The general rule is, that where the vendee becomes insolvent the vendor has a right to stop the goods at any time before they come into the actual possession of the vendee. In *Lickbarrow v. Mason*, 2 *Term Rep.* 71. Mr. Justice *Aspburst* says, "where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery, and therefore in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*." Now at the time when these goods were demanded by the Plaintiffs, they had not arrived at their journey's end: for they had only reached *Exeter*, and were to be carried on from thence, and delivered to the vendee at *North Tawton*. The case of *Hodgson v. Loy*, 7 *Term Rep.* 440. is a decided authority in the Plaintiffs' favour. Indeed that case is much stronger than the present, since the initials of the vendee had been marked upon the articles in dispute previous to the stop-

page *in transitu*, and they were delivered to a carrier nominated by the vendee: neither of which circumstances occur in this case. So in the case of *Stokes v. La Riviere*, cited 3 *Term Rep.* 466, and 7 *Term Rep.* 443. the goods were sent by the particular conveyance appointed by the consignee: and in *Hunter v. Beal*, cited 3 *Term Rep.* 466. the goods in question were sent to the Defendant, who was an innkeeper, directed to the consignees, and while in his hands he received directions from the consignees to ship them, and was only prevented from so doing because he arrived too late at the quay with the goods; yet in both these cases the consignees were held entitled to stop the goods *in transitu*. And in *Hunt v. Ward*, cited 3 *Term Rep.* 467. where goods were sent by order of the vendor to a packer, the packer was considered as a middle man, and the vendor was held to have a right to stop the goods. If the Court should be of opinion that the Plaintiffs are entitled to succeed, the only remaining question will be, what damages the Plaintiffs shall recover? Whether 111*l.* 7*s.* 3*d.* the value of the goods, 103*l.* 7*s.* the sum for which they were sold, or 99*l.* 17*s.* the sum for which they sold after deducting the charges?

Here the Court expressed themselves clearly of opinion that the Plaintiffs were only entitled to the smaller sum.

Shepherd Serjt. contra. The letter of the 16th of September 1799, being written to the Plaintiffs, by the bankrupt after the act of bankruptcy, can have no effect in the case, as it cannot operate to rescind the contract. *Barnes v. Freeland*, 6 *Term Rep.* 80. *Smith v. Field*, 5 *Term Rep.* 402. in which latter case the Court, referring to a case of *Salte v. Field*, 5 *Term Rep.* 211. take the distinction that though before the act of bankruptcy the vendee may rescind the contract, yet that after that time he cannot. The principal questions therefore in this case are, whether the claim made amounted to a stoppage, and whether at the time they were claimed they were still *in transitu*? It is true that the doctrine laid down by Lord Hardwicke in *Snee v. Prescott*, 1 *Ath.* 250. "that a consignor may get the goods back again by any means, provided he does not steal them," is very strong. But in that case as well as in all the cases since, in which that doctrine has been recognised, the goods have been actually seized by the consignor before they have come into the possession of the consignee; whereas in this case the vendor was not able to get them

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out of the wharfinger's hands into his own possession, and is now claiming to have a right of action against the wharfinger for not delivering them. Had the wharfinger delivered the goods to the Plaintiffs on their demand, perhaps they would have been entitled to retain them; but Lord *Eldon*, when this cause was tried, seemed to entertain some doubt as to their right to sue the wharfinger. Though if the Plaintiffs had put their mark upon the goods while in the warehouse of the wharfinger, or if the wharfinger had agreed to hold them for the Plaintiffs, such circumstances might have amounted to a stoppage; still it may be very questionable whether a mere notice to the wharfinger of a right to the goods is tantamount to a stoppage. In considering whether the goods were *in transitu* at the time the notice was delivered to the wharfinger, it may be observed that in all the cases on this subject expressions have been used which must be deemed figurative; such as that the goods must have come to the "corporal touch" of the consignee, which Lord *Kenyon* in *Ellis v. Hunt*, 3 Term Rep. 468. allows to be a figurative expression, and that they must have come "to their journey's end," which if strictly true would do away the authority of *Ellis v. Hunt*. Now here the wharfinger must be deemed the agent of the bankrupt, since he received the goods on his account and debited him with the freight and charges.

Lord ALVANLEY Ch. J. The case before the Court is shortly this. *Gard* being a trader at *North Tawton*, gives orders to the Plaintiffs to send the goods in question to him from *London*, but does not direct that they shall be sent by any particular ship; his orders were that they should be sent to him at *Exeter* to be forwarded to *North Tawton*. They were accordingly shipped, arrived at *Exeter*, and were put into the hands of a wharfinger to be forwarded to their journey's end. In the books of the wharfinger they were put to the account of *Gard* as the person to whom they were directed, and he was considered as the wharfinger's paymaster. In this state of things the letter of the 16th September was received by the Plaintiffs, the meaning of which I take to be this; the vendee says, "my situation is such that I will not receive the goods, and you may take them back again if you think proper." The Plaintiffs immediately on the receipt of this letter sent to the wharfinger and forbade him to deliver them according to the direction. The wharfinger promised not to deliver them till he could do so with safety, notwithstanding which he afterwards delivered them

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them to the assignees of *Gard*. The question is whether the goods in the hands of the wharfinger were in such a situation that the vendors could stop them? The cases cited for the Plaintiffs have established that where there is a contract for the sale of goods, and a delivery has been made to a middle man, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state as to be in the actual or constructive possession of the buyer. The only question is, whether these goods are to be considered as having been in the hands of a middle man, or as having been taken in the possession of the person for whom they were ultimately intended? If in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession; and puts an end to the vendor's right to stop them. So, though it has been said that the right of stoppage continues until the goods have arrived at their journey's end, yet if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage (a). I am of opinion that the wharfinger in this case not having been particularly employed by the vendee, is to be considered as a middle man. And it has almost been admitted in the argument, that if the Plaintiffs could have got the goods into their possession they would have had a right to keep them. But then another question arises, *viz.* admitting that the Plaintiffs would have had a right to

(a) But in a case of *Holt v. Pownall*, and another, 1. *Esp. N. P. Cas.* 220. where a cargo consigned to a person at *Liverpool* was on the arrival of the ship there taken possession of by the assignees of the consignee who had become bankrupt; and the ship was afterwards obliged to perform quarantine, and during that quarantine was claimed by the consignor, Lord *Kenyon* is reported to have ruled that the consignor had a right to the goods, saying that "in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignee on the completion of the voyage; that the case put by the Defendant's counsel, that the consignee had a right to go out to sea to meet the ship could not be supported, as it might go the length of saying that the consignee might meet the vessel coming out of

the port from whence she had been consigned, and that that should divest the property out of the consignor and vest it in himself; which was a position not to be supported, as there would then be no possibility of any stoppage *in transitu* at all." It is added in the report, that the Court of *King's Bench* on a motion for a new trial confirmed the opinion delivered by Lord *Kenyon* at *Nisi Prius*.—*Quære*, whether there be any distinction between carriage by sea and carriage by land upon this point: for it may be observed that in the former case the master by signing the bill of lading agrees with the consignor to deliver the goods at the destined port; whereas in the latter, no such express agreement is entered into between the vendor and the carrier.

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retain the goods had they got them into their own possession, whether they have any right of action to recover them out of the hands of the middle man? I am very far from wishing that it should be understood that an action may be brought by the person entitled to stop the goods against any carrier, who after notice to retain the goods delivers them to the person to whom they were originally consigned: such a rule would be highly oppressive to carriers. A carrier knows nothing of the vendor. In the case of a conveyance by ship, the master signs a bill of lading by which he engages to deliver the goods to the consignee or his order: and if he deliver them accordingly it can hardly be supposed that he thereby subjects himself to an action, because the vendor has a right to stop the goods *in transitu* (a). In the present case, however, full notice was given to the wharfinger by the consignor, and no demand was made on the part of the original consignee. The consignor by letter demanded possession; and the wharfinger admitted himself to be in the nature of a stakeholder bound to deliver according to the right. Without determining therefore whether the wharfinger would have been liable without notice, or even after notice, supposing no undertaking to have been made by him, I think it clear that the Defendant in this case having undertaken "not to deliver the goods out of his custody till he was certain of a safe delivery," is answerable to the Plaintiff.

HEATH J. I am of the same opinion. The general rule of law is admitted on all hands. The only point in this case depends upon the application of that rule to the facts. The question therefore is, whether these goods in point of fact were stopped *in transitu*? Here there certainly was no corporal touch: but that took place which was equivalent to it. The Plaintiffs gave notice to the wharfinger and demanded the goods as their property: and the wharfinger undertook not to deliver them till he was certain of a safe delivery. It is unnecessary therefore to consider whether without such undertaking the Defendant would have been liable. Whenever that case occurs it will receive due consideration from the Court. In this case doubts have arisen with some of the Court respecting the effect of the letter of the 16th of September. It appears to me however that it will not vary the Plaintiffs' right.

(a) In *Fearon v. Bowers*, 1 H. Bl. 364. In *notis*, it was held by *Les Ch. J.* that where several bills of lading are indorsed to different persons, the captain is discharged by a delivery to either of the consignees.

In *Berwick v. Atkyn*, 1 Str. 165, the refusal by the bankrupt to receive the property seems to have been considered meritorious. So I think that the conduct of the bankrupts in this case was commendable.

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ROOKE J. In this case there is no dispute respecting the rule of law. The only difficulty arises upon the application of the facts to the law. It is agreed that a contract once completely executed cannot be rescinded. If therefore the goods had got into the hands of the consignee, there is no doubt that he would have been precluded from giving a preference to any one. But while the goods are *in transitu* they may be stopped. Then can there be any doubt whether these goods were *in transitu* or not? The consignees did nothing to take possession of the goods while they remained with the wharfinger before the Plaintiffs made their claim. That claim was made in consequence of information (which appears to me to have been very proper) that circumstances had arisen in the affairs of the consignees which made it improper for them to receive the goods. In what manner that information was obtained can make no difference in the case. The honesty of the consignees ought not to prejudice the Plaintiffs' right. If indeed the consignees after getting the goods into their hands had given them up, the case would have been very different: but here the information was given while the goods were *in transitu*. I do not meddle with the question how far an action might be maintained against a carrier upon a bare notice not to deliver; but I do not say that such an action might not be maintained.

CHAMBRE J. The 1st question is, whether these goods were *in transitu* at the time they were claimed by the Plaintiffs? The goods were directed to be sent to *North Tawton* where the bankrupt lived, and having been carried as far as they could go by water they were delivered to a wharfinger to be forwarded to the bankrupt. While they were with the wharfinger the demand was made, no act having been done to shorten the journey. We cannot, therefore, without overturning all the cases, say the goods were not *in transitu*. The second objection is, that in order to entitle the Plaintiffs to this action, they should have been taken actual possession of by the Plaintiffs, either by corporal touch, or something equivalent thereto. The first delivery to the carrier vests the property in the vendee, but the property so vested is a defeasible property, and may be defeated by the insolvency of the vendee.

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When therefore the vendor, having notice of such insolvency, makes a demand upon the person in whose custody the goods are, he thereby defeats the contract. If this were not the case, the carrier would have it in his power to decide between the vendor and the assignees of the bankrupt. In the present case there can be no doubt of a conversion having taken place. Cases of difficulty may indeed arise; as if a carrier upon reasonable doubt should refuse to deliver up the goods without further authority, or until the circumstances of the case are ascertained (*a*): for a demand and refusal do not always constitute a conversion (*b*); there are many cases to the contrary. But here there was an actual conversion, the defendant having delivered the goods contrary to his own undertaking. There is another point however upon which I have entertained some doubt. The vendor did not get possession of these goods by his own diligence and care, or in consequence of casual information; but through the intervention of the bankrupt himself eight days after the act of bankruptcy committed. That circumstance raised some doubt in my mind; since it appeared that the bankrupt had thereby given a preference to the Plaintiffs over the rest of his creditors. But still upon the whole I am inclined to agree with the rest of the Court. I am not fond of multiplying small distinctions, and think that too many have been already taken: and the general inconvenience will not be very great, since many cases of this kind are not likely to arise. It seems indeed that there will be a certain degree of discretion vested in the bankrupt, since he will be empowered to accept goods which are coming to him from one consignee, and to give notice to another consignee to stop them *in transitu*. But as no fraud appears to have been committed on the part of the Plaintiffs in this case, I am inclined on this point, as well as the others, though not without some doubt, to concur with the rest of the Court.

Per Curiam, Let the verdict be entered for the Plaintiffs for 99*l.* 17*s.*

(*a*) If a person finds my goods and I demand them, and he answers that he knows not whether I am the true owner or not, and therefore refuses to deliver them, this is not to be deemed a conversion to his own use, as he keeps them for the owner. *DiA. Per Coke Ch. J. 2 Burr. 312.* The same doctrine is laid down by Lord Kenyon,

in *Solomon v. Dawes*, 1 *Esp. N. P. Cas.* 83.

(*b*) *DiA. Per Lord Mansfield*, 3 *Burr.* 1243. And indeed if demand and refusal only be found upon a special verdict, it shall not be adjudged a conversion, 10 *Co.* 57. *Hob.* 187. 2 *Mod.* 245. See also *Ross v. Johnson*, 5 *Burr.* 2827, and *Sydes v. Hay*, 4 *Term Rep.* 260.

GOVETT v. JOHNSON and Another.

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June 17th.

LENS and Bayley Serjts. were to have shewn cause against staying proceedings upon the bail-bond in this case on the usual terms, but said they should content themselves with insisting against the Defendants being allowed to plead in abatement that two only out of three joint-contractors were sued; and to shew that they ought to be restrained from so pleading, they cited 2 Salk. 519. Anon. as directly in point.

Best and Onslow Serjts. contended, that the plea that other joint-contractors were not sued was not a mere dilatory plea, and therefore the Court would not impose such a restriction as the Plaintiff required.

But the Court said they thought it a very reasonable restriction, and that they would not stay the proceedings on the bail-bond to give the Defendants an opportunity of pleading in abatement.

Rule absolute, on the Defendants undertaking not to plead in abatement.

When two only of three joint contractors are sued, the Court will not stay proceedings upon the bail bond unless the Defendants will undertake not to plead in abatement.

LEES v. WARLTERS.

June 18th.

REPLEVIN. The Defendant made cognizance as bailiff to J. L. for rent arrear, and in his several cognizances stated that the Plaintiff held the land "under a certain demise to him the said John Lees theretofore made." The Plaintiff pleaded in bar, that he did not hold the land under a demise to him made in manner and form, &c. After this the Defendant obtained a judge's order 'that he should be at liberty to amend the cognizances, by striking out in each cognizance the words "to him the said John Lees," and that the Plaintiff should also be at liberty to plead *de novo*; and in case the Plaintiff should plead new matter, the Defendant should pay the costs of the amendment to be taxed by the Prothonotary; but if the Plaintiff should not plead new matter, the Defendant should pay such costs only as should be occasioned by making the cause a *remanet*, and passing the record.' The cognizances having been amended according to the order, the Plain-

The Defendant in replevin having averred in his cognizance that the Plaintiff held the land under "a certain demise to him the said J. L. (the Plaintiff) theretofore made," Plaintiff pleaded in bar that he did not hold under a demise in manner and form. Upon this Defendant obtained an order to amend by

striking out the words "to him the said J. L." with liberty to the Plaintiff to plead *de novo*, and that in case the Plaintiff should plead new matter, the Defendant should pay all the costs of the amendment. The Defendant having amended accordingly, the Plaintiff demurred specially, and assigned for cause that it did not appear to whom the demise was made. Held that the demurrer was not new matter.

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tiff demurred, specially assigning for cause that it did not appear to whom the demise was made (a).

The Prothonotary considering the special demurrer as new matter, allowed all the costs of the amendment; upon which a rule was obtained by *Bayley* Serjt. calling on the Plaintiff to shew cause why the Prothonotary should not be directed to review his taxation.

Against which rule *Best* Serjt. now shewed cause, and contended, that the demurrer arose entirely out of the alteration in the cognizances, and stated that it had always been the practice in the Prothonotary's office to consider such a demurrer as new matter; in which he was confirmed by the Prothonotary himself.

But the Court were of opinion that this special demurrer ought not to be considered as new matter within the meaning of the order, and directed the Prothonotary to review his taxation.

Rule absolute.

(a) *Vid.* the Stat. 11 Geo. 2. c. 19. s. 2. avow or make conveyance generally without which empowers Defendants in replevin to setting out the title of the lessor.

June 18th.

HOWELL v. COLEMAN.

The Court will not set aside proceedings and order the bail bond to be delivered up, because a Defendant has been arrested on a special *capias* in which as well as in the affidavit to hold to bail, the initials only of his Christian name were inserted.

BAYLEY Serjt. moved for a rule to shew cause why all proceedings in this case should not be set aside for irregularity, and the bail-bond be delivered up to be cancelled.

It appeared that the Defendant had been arrested upon a special *capias*, in which he was named *W. G. Coleman*, without stating either of the Christian names at length, and that the affidavit to hold to bail described him in the same manner.

The Court observed, that the Defendant had not been arrested by a wrong name, and thought the objection immaterial.

Bayley took nothing by his motion.

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TAPPENDEN and Others, Assignees of BRAY v.

June 19th.

RANDALL.

THIS cause came on to be tried before Lord *Alvanley* Ch. J. at the second Sittings in this Term, when a verdict was found for the Plaintiffs, damages 216*l.* costs 10*l.* subject to the opinion of the Court on the following case.

The declaration stated, that the Defendant, before the bankruptcy of *Bray*, was indebted to *Bray* in 300*l.* for money lent, and 300*l.* for money paid, and that he was indebted to the Plaintiffs after the bankruptcy in 300*l.* as well for money before *Bray* became a bankrupt received to *Bray's* use, as for money after the bankruptcy received to the use of the assignees, and upon an account stated with the Plaintiffs as assignees.

Bray duly became a bankrupt, and a commission was issued against him, under which the Plaintiffs were declared his assignees. On the 12th of *November* 1800, previous to any act of bankruptcy, in consideration of 210*l.* then paid by *Bray* to the Defendant, the Defendant entered into a bond in the penal sum of 999*l.* with a condition as follows: "Whereas the said *William Randall* hath, in
 " consideration of two hundred and ten pounds to him paid by
 " the said *John Bray*, at the time of the sealing and delivery of
 " the above written bond or obligation, contracted and agreed to
 " pay unto the said *John Bray* or his assigns on the first day of
 " *May* in every year, one annuity or clear yearly sum of one hun-
 " dred and five pounds until he the said *William Randall*, his
 " heirs, executors, or administrators can prove by evidence, or
 " otherwise to abide by the report of three eminent hop mer-
 " chants, who shall make it appear to the satisfaction of the said
 " *John Bray*, his executors, administrators, and assigns, that the
 " revenue received by Government by reason of the duties now
 " assessed by Parliament upon hops grown in *Great Britain*,
 " shall in the present or any one year hereafter amount to a full
 " and clear revenue or sum of two hundred thousand pounds,
 " such duties to be taken according to those at present imposed by
 " Parliament, and not to be affected by any subsequent alteration
 " whatever; and for securing the due payment of the said annuity
 " of one hundred and five pounds until such event, the said *Wil-*

A. in con-
 sideration of
 200*l.* paid by
B. gave a
 bond for the
 payment of
 an annuity to
 the latter of
 100 guineas,
 until the hop
 duties should
 amount to a
 certain sum.
 Before this
 event had
 taken place
B. brought
 an action to
 recover back
 the 200*l.* of
A. Held that
 the action
 was main-
 tainable.

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" *liam Randall* hath entered into the above written bond or obligation: Now therefore the condition of the above written bond or obligation is such that if the said *William Randall*, his heirs, executors, administrators, or assigns, shall and do from the day of the date of the above bond well and truly pay, or cause to be paid unto the said *John Bray* or his assigns one annuity or clear yearly sum of one hundred and five pounds of lawful money of *Great Britain* on the first day of *May* in each and every year, without any deduction or abatement whatsoever, until the said *William Randall*, his heirs, executors, or administrators shall prove by evidence, or otherwise abide by the report of three eminent hop merchants, who shall make it appear to the satisfaction of the said *John Bray* or his assigns that the revenue received by Government by reason of the duties now assessed by Parliament upon hops shall in the present or any one year hereafter amount to a full and clear revenue or sum of two hundred thousand pounds, such duties to be taken according to those at the present time imposed by Parliament, and not to be affected by any subsequent alteration therein, and shall and do make the first payment of the said annuity of one hundred and five pounds on the first day of *May* in the year of our Lord 1802, then and in such case or cases the above written bond or obligation should be void and of none effect, otherwise it shall be and remain in full force and virtue.

" *Wm. Randall* (Seal).

" Sealed and delivered (being first legally
" stamped, and several obliterations and
" interlineations being made) in presence
" of

" *John Broad.*

" *Wm. Mann.*

" Received at the time of the sealing and delivery of the within written bond or obligation of and from the within named *John Bray* the sum of two hundred and ten pounds (being the consideration paid for the annuity within secured), by me. Signed in the presence of *John Broad, Wm. Mann.* } £.210.

" *Wm. Randall.*"

Before the bringing of this action the Plaintiffs applied to the Defendant, stating that they considered the bond to be illegal,
and

and demanding the return of the 210*l.* and interest, which was refused.

If the Court should be of opinion that the Plaintiffs were entitled to recover back the said sum of 210*l.* with interest thereon, then the verdict to stand. If the Court should be of opinion that the Plaintiffs were entitled to recover back the said sum of 210*l.* but were not entitled to interest thereon, then the verdict to be entered for 210*l.* damages and 40*s.* costs. If the Court should be of opinion that the Plaintiffs were entitled to recover nothing, a non-suit to be entered.

Bayley Serjt. for the Plaintiffs. The Plaintiffs' right to recover in this action results from two points, which are both clearly in their favour, viz. 1st, That the bond stated in the case, and upon which the money was advanced is void; and, 2dly, that this action is brought before the event has happened, which the parties had in contemplation at the time of entering into the contract. 1st, That the bond is void, most clearly appears from *Atherfold v. Beard*, 2 Term Rep. 610. and *Shirley v. Sankey*, ante, 130. [This was admitted on the other side.] 2dly, The money advanced by the bankrupt was not advanced on a contract which was either *malum prohibitum* or *malum in se*, but merely money advanced on a consideration which has failed, the bond given to secure its repayment not being such as can be enforced at law. In *Cotton v. Thurland*, 5 Term Rep. 405. which was an action to recover a deposit from a stake-holder on a wager respecting the event of a boxing match, it was admitted that as long as the contract is executory, money so paid may be recovered back; and though that case was decided on the ground of the action being brought against the stakeholder, who not having paid it over was justified in refusing to return it, yet Lord Kenyon alludes to the distinction between contracts executory and executed when he says, "this is not like the case of a policy of insurance, where the risk having been run the party has attempted to regain his money again." Indeed, in *Lowry v. Bourdieu*, Doug. 468. where the insured in an illegal policy attempted to recover back the premium after the risk had been run, Buller J. says, "there is a sound distinction between contracts executed and executory, and if an action is brought to rescind a contract you must do it while the contract continues executory;" and observes that if the action had been commenced before the risk was over the Plaintiff might have had a ground for

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his demand. With respect to the late case of *Vandyck v. Hewitt*, 1 East. 96. where it was held that the premium paid on an insurance to cover enemy's property could not be recovered back, there the risk had been run before the action was brought, and the act of insuring enemy's property was an offence against the policy of the state. Indeed in *Lacaufrage v. White*, 7 Term Rep. 535. money paid on an illegal wager was recovered back after the event upon which the wager proceeded had turned out against the Plaintiff, the Court holding it more consonant to sound policy to permit money paid on an illegal consideration to be recovered back by the party paying it, than by denying the remedy to give effect to the illegal contract.

Best Serjt. for the Defendant. It is perfectly clear that where money has been advanced without any consideration it may be recovered back, but if advanced on a consideration which fails because the contract is illegal, then the rule applies that *in pari delicto potior est conditio possidentis*. The only case in which this rule has ever been impeached at all is *Lacaufrage v. White*, and that decision was treated by the Court in *Vandyck v. Hewitt* as not quite sound, *Le Blanc J.* saying it had since been "very much canvassed in *Howson v. Hancock* (a), where it was considered that money deposited on an illegal wager and paid over to the winner could not be recovered from him." If the contract in the present case be a legal one, the bond is not void but the Plaintiff will have the benefit of the consideration he has advanced when his time comes to demand payment of the annuity; if it be not legal the rule of *potior est conditio possidentis* applies. It is not necessary that the contract should be immoral, it is sufficient if it be illegal; and indeed in *Howson v. Hancock*, Lord *Kenyon* so treats it when he says, "here the money was not paid on an immoral, though an illegal consideration," (viz. a wager on a horse-race) and yet the Plaintiff was not permitted to recover.

Lord ALVANLEY Ch. J. Without taking time to look into all the cases which have been cited, it does appear to me to be clear that the Plaintiff in this case is entitled to recover back the money which he has advanced. In the present transaction there was no moral turpitude whatsoever: and though it has sometimes been held that where there is moral turpitude in the contract, the Court

(a) 8 Term Rep. 575.

will not allow the party who has advanced money on such a contract to recover it back; yet no argument of that sort can be urged in the present case. The simple statement of this case is, that after the money had been paid, but before the time had arrived at which the event in contemplation of the parties contracting was to take place, it was found out that the contract was illegal; and therefore the money paid was demanded back again. There is hardly any case of this sort in which the distinction between immoral and illegal transactions has not been taken. I do think that there is a material distinction between wagers which are not recoverable on account of some inconvenience which the public may sustain by the open discussion of the questions to which they give rise, and those which are in themselves immoral. In the present case one party has paid money without any consideration and is therefore entitled to recover it back from the party to whom he paid it.

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HEATH J. I am of the same opinion. It seems to me that the distinction adopted by Mr. Justice *Buller* between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of that kind occurs I think there ought to be a *locus penitentiae*, and that a party should not be compelled against his will to adhere to the contract.

ROOK J. This is an action brought by assignees to recover back money paid by way of consideration for a bond which clearly could not be put in force, and I think this action may well be supported. There is nothing criminal in the contract which was entered into between these parties; nor has that contract been executed; nor indeed is this a case where money which has been paid over by a stakeholder is sought to be recovered. I therefore see no reason to prevent the present Plaintiffs from recovering: and I wish it to be understood that I fully accede to the doctrine laid down by Mr. Justice *Buller* respecting contracts executory and executed. If in this case any money had been paid upon the bond I should have felt great difficulty respecting the right of the Plaintiffs to recover.

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CHAMBRE J. Undoubtedly there is a great deal of refinement in the discussion which arises out of this species of action: but still I think that the nature of this contract is not such as to prevent the Plaintiff from recovering the money which he has advanced without consideration. The contract which the parties entered into is not prohibited by any declaration of any positive law upon the subject, nor is it *malum in se*: but it is a contract which cannot be put in force merely because it is inconvenient that the merits of the question should be publicly discussed. Indeed, supposing the parties able to refer to some published documents respecting the amount of the duties, all objections to the wager would cease. Before the contract was in any way executed, it being found that the aid of the law could not be had to enforce the bond, application was made to the Defendant to pay back the money which had been advanced, and the Defendants having refused to pay it, I think the Plaintiffs are entitled to recover in this action.

Postea to the Plaintiffs.

It was then suggested to the Court that it would be necessary for them to give an opinion respecting the amount which the Plaintiffs were entitled to recover; upon which the Court observed that in an action for money had and received, nothing but the net sum advanced without interest could be recovered (a), and that the verdict must therefore be entered for the lesser sum.

(a) Vide *Moses v. Macferlan*, 2 Burr. 1005. and *Walker v. Coustable*, ante, vol. i. p. 306.

June 20th.

BAGOTT v. ORR.

Prima facie, every subject has a right to take fish found upon the sea shore between high and low water mark; but such general right may be abridged by the existence of an exclusive right in some individual. *Quære*, If there be a *prima facie* right in the subject to take fish/shells found on the sea shore between high and low water mark.

TRESPASS. The 1st count was for breaking and entering the Plaintiff's closes, called the *Foot-Muscle-Skear*, the *Great-Out-Muscle-Skear*, and the *Sea-Shore*, in the parish of *Keysham*, and Plaintiff's shell-fish and shells there finding, catching, taking, and carrying away and converting and disposing thereof to Defendant's own use. The 2d count was for breaking and entering the same closes, and with Defendant's feet and the feet of his servants in walking, treading up, trampling upon, subverting and spoiling Plaintiff's foil, earth, and sand, and with the feet of cattle and with

the

the wheels of carriages and the keels of boats treading up, trampling, &c. and Plaintiff's shell-fish and shells, breaking, crushing, and destroying, and with spades, shovels, mattocks, pickaxes and other instruments digging and making holes and pits, and turning up, &c. Plaintiff's earth, soil, and sand, and digging up, raising up, and getting up divers large quantities of Plaintiff's shell-fish and shells, and carrying away the same and converting and disposing thereof to Defendant's own use. There were several other counts for breaking and entering Plaintiff's several fishery and his free fishery, on which issues in fact were joined.

The Defendant pleaded, 1st, the general issue. 2dly, As to the trespasses mentioned in the two first counts that the closes therein severally mentioned were the same, "and that the said closes in which, &c. at the said several times when, &c. were and still are and from time immemorial have been part and parcel of a certain arm of the sea, in which every subject of this realm at the said several times when, &c. of right had, and of right ought to have had and now hath, and of right ought to have the liberty and privilege of fishing and catching, digging for, raising, getting, taking and carrying away shell-fish and shells there, therefore Defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. so being part and parcel of the said arm of the sea to fish therein and to catch, dig for, raise, get, take, and carry away the shell-fish and shells there, and did then and there fish and caught, took, and carried away the said shell-fish and shells in the first count mentioned, and also dug up, raised up, and got up, took and carried away the said other shell-fish and shells in the second count lastly mentioned, as it was lawful for him to do, and for the digging up and carrying away of the said shell-fish, he entered the said closes in which, &c. by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable, proper, and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet and the feet of those other persons in walking a little trod up, trampled upon, subverted and spoiled the soil, earth, and sand in the second count mentioned, and with the feet of the said cattle and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels a little trod up, trampled upon, tore up, and subverted and spoiled other the

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soil of Plaintiff's last mentioned closes, and the said shell-fish and shells in the second count first mentioned necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, and in digging up, raising, and getting the said shell-fish and shells in the second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in Plaintiff's said closes, and necessarily and unavoidably with the spades, shovels, mattocks, pickaxes, and other instruments dug up, turned up, subverted, and spoiled a little of the earth, soil, and sand in the said closes, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c.

Upon this the Plaintiff new assigned, alleging that Defendant on the days in the first count mentioned broke and entered Plaintiff's closes in the first count mentioned, "being certain closes lying within the flux and reflux of the tides of the sea in Plaintiff's manor of *Keysham*, and the said shell-fish and shells there then found, caught, took, and carried away and converted and disposed thereof to his own use, when the same closes in which, &c. were left dry and were not covered with water." And also that Defendant on the days and in the manner in the second count mentioned broke and entered Plaintiff's closes, "being certain closes lying within the flux and reflux of the tides of the sea within Plaintiff's said manor of *Keysham*, and with his feet, &c. trod up, &c. the said earth, soil, and sand, in the second count mentioned, and with the feet of the said cattle in that count mentioned, and with the wheels of the said carts, &c. and with the keels of the said boats, &c. trod up the said other soil in Plaintiff's last mentioned closes in the said second count mentioned, and Plaintiff's said other shell-fish and shells in the second count mentioned, broke, crushed, &c. and with spades, &c. dug and made holes, &c. and raised up and got up the said shell-fish and shells, &c. and took and carried away the same, and converted and disposed thereof, &c. when the last mentioned closes in which, &c. were left dry and were not covered with water, as Plaintiff hath in the first and second counts of the said declaration complained against him, which several trespasses so above new assigned are other and different trespasses, &c. Wherefore, &c.

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To the new assignment the Defendant pleaded, 1st, the general issue; 2dly, "that the said closes first above newly assigned, and the several closes secondly above newly assigned are, and at the said several times, &c. were the same closes and not other or different closes, and are and at those times when, &c. were certain rocks and sands of the sea, lying within the flux and reflux of the tides of the sea; and that the said shell-fish and shells in the said closes in which, &c. were certain shell-fish and fish-shells, which at the said several times when, &c. were in and upon the said rocks and sands of the sea, and which but a little before the said times when, &c. were by the ebbing of the tides of the sea left there in and upon the said closes in which, &c.; and that in the said closes in the said declaration mentioned every subject of this realm at the said several times when, &c. of right had and of right ought to have had, and now hath and of right ought to have the liberty and privilege of getting, taking, and carrying away the shell-fish and fish-shells left by the said ebbing of the tides of the sea in and upon the said closes, in which, &c. wherefore the Defendant being a subject of this realm at the said several times when, &c. entered into the said closes in which, &c. to get take and carry away the shell-fish and fish-shells left by the ebbing of the tides of the sea in and upon the said closes in which, &c. and then and there got, took, and carried away the said shell-fish and shells in the said first count mentioned, and also got, and for that purpose with spades, shovels, mattocks, pickaxes, and other instruments necessarily dug up and raised up, and took and carried away the other shell-fish and shells in the second count lastly mentioned; and for the getting, taking, and carrying away of the said shell-fish and shells, the Defendant at the said times when, &c. entered the said closes in which, &c. as it was lawful for him to do by himself and with other persons, and with the said cattle, carts, waggons, and other carriages, and the said boats, lighters, and other vessels, the same being reasonable and proper and necessary in that behalf, and in so doing he necessarily and unavoidably with his feet and the feet of those other persons in walking, a little trod up, trampled, subverted, and spoiled the soil, earth, and sand in the said second count mentioned, and with the feet of the cattle and with the wheels of the said carts, waggons, and other carriages, and with the keels of the said boats, lighters, and other vessels a little trod up, trampled upon, tore up, subverted, and spoiled other the said soil of the said last-mentioned

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mentioned closes of the Plaintiff, and the shell-fish and shells in the second count first mentioned, necessarily and unavoidably a little broke, crushed, and destroyed, and with the said spades, shovels, mattocks, pickaxes, and other instruments, the same being useful, proper, and necessary in that behalf, in digging up, raising, and getting the said shell-fish and shells in the said second count lastly mentioned, necessarily and unavoidably dug and made the said holes and pits in Plaintiff's said closes, and necessarily and unavoidably with the said spades, shovels, mattocks, pickaxes, and other instruments dug up, turned up, subverted, and spoiled a little of the said earth, soil, and sand in the said closes, as it was lawful for him to do for the causes aforesaid, doing as little damage on that occasion as he could, which are the same, &c. whereof, &c. And this, &c. wherefore, &c."

To this plea there was a replication, traversing the right of every subject to take shell-fish and shells, and a special demurrer thereto because it traversed matter of law: but the Court seeming to think that the replication was clearly bad, it was abandoned by the Plaintiff's Counsel, who relied upon objections to the plea.

Marshall Serjt. in support of the plea. The question is, whether every subject of the realm has a right to take the shell-fish and shells which are left upon the sea-shore by the ebbing of the tides. The right of fishing in the sea is acknowledged by all nations; it is universal, and part of the law of nations. *Grotius de Jure Bel. ac Pac. lib. 2. c. 2. §. 3.* And according to *Grotius* no person can have any property either in the main sea, or in the principal arms of the sea; neither can a man have any property in the shores and sands of the sea: these are all incapable of improvement, and never can be exhausted by the only uses to which they can be applied, namely those of supplying fish and sand. *Bracton (lib. 1. c. 12. fol. 7. b.)* adopting the doctrine of the civil laws, says, "*Naturali vero jure communia sunt omnia hæc, aqua profluens, aer, et mare, et littora maris, quasi maris accessoria; nemo enim ad littus maris accedere prohibetur dum tamen a villis et ædificiis absteineat: quia littora sunt de jure gentium communia sicut et mare.*" And he adds, "*Publica vero sunt omnia flumina et portus; ideoque jus piscandi omnibus commune est in portu et in fluminibus; riparum etiam usus publicus est de jure gentium sicut ipsius fluminis.*" So *Sir Mathew Hale* in his *Treatise de Jure Maris, part 1. cap. 4. Hargrave's Law Tracts, p. 10, 11.* observes, "In the sea the King of England hath a double right, namely

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namely a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The King's right of propriety or ownership in the sea is evidenced principally in these things that follow: 1st, The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. But though the king is the owner of this great waste, and as a consequent of his property hath the primary right of fishing in the sea, and the creeks and arms thereof, yet the common people of *England* have regularly a liberty of fishing in the sea, or creeks or arms thereof as a public common of piscary; and may not without injury to their right be restrained of it unless in such places, creeks, or navigable rivers where either the king or some particular subject hath gained a propriety exclusive of that common liberty." In the same treatise, p. 12. it is said, "that *de jure communi* between the high water and low water mark, doth *primâ facie* belong to the king; *Constable's case*, 5 Co. 107. and *Dyer*, 326. b.; although it is true, that such shore may be and commonly is parcel of the manor adjacent; and so may belong to a subject, yet *primâ facie* it is the king's." From *Constable's case*, 5 Co. 107. 2 *Rol. Abr.* 170. it appears that the shore may belong to the subject either in gross or as parcel of his manor: but merely being the manor of a particular person is not sufficient to exclude those who have a right to fish there. One may have a manor and another the right of fishing in the water; but if a man would claim a right of fishing in the water of another, the proof of the right lies upon him. In *Warren v. Matthews*, 6 Mod. 73. 1 *Salk.* 357. S. C. Holt Ch. J. says, "Every subject of common right may fish with lawful nets in a navigable river as well as in the sea; and the king's grant cannot bar him thereof." So in 1 *Mod.* 105. Lord *Fitzwalter's case*, Hale Ch. J. says, "In case of a river that flows and reflows, and is an arm of the sea, there *primâ facie* it is common to all: and if any one will appropriate a privilege to himself the proof lieth on his side; for in case of an action of trespass for fishing there, it is a good justification to say that the *locus in quo est brachium maris in quo unusquisque subjectus Domini Regis habet et habere debet liberam piscariam*. The soil of the river *Thames* is in the king, and the Lord Mayor is conservator of the river, but it is common to all fisher-

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men, and therefore there is no contradiction in the soil being in one and the right of fishing in the river common to all fishermen." Again in *Ward v. Creswell*, *Willes' Rep.* 265. 16 *Vin. Abr.* 354. tit. *Piscary* B. S. C. the Court held that all the subjects of *England* of common right might fish in the sea, it being for the good of the commonwealth, and for the sustenance of all the people of the realm; and that therefore a prescription for it as appurtenant to a particular township was void, and as absurd as a prescription would be for travelling the king's high way, or for the use of the air as appurtenant to a particular estate. The Statute 7 *Jac.* 1. c. 18. after stating in the preamble that divers persons having lands adjoining to the sea coast in the counties of *Devon* and *Cornwall*, had of late interrupted the bargemen and such others as had used at their free wills and pleasures to fetch sea sand and take the same under the full sea mark, as they had theretofore used to do, enacts that all persons in the said counties should be at liberty to take sea sand at all places under the full sea mark. That statute was in fact a full recognition of the right of the subject to use the shore of the sea in every way in which it could be serviceable to him. It proves that his right is not confined to the privilege of taking shell-fish left on the shore by the ebbing of the tides, but that he may also take the fish-shells and even the sand of the shore.

Best Serjt. contrd. Admitting the general right of the subject to take the fish of the sea, still in this case that general right is circumscribed by the circumstance of the place in which these shell-fish and fish-shells were taken being part of the manor of *Keyham*. Unless therefore the Defendant set up a right of common on the soil, he cannot support the easement which he claims. *Primâ facie* the shores of the sea belong to the king, and he may grant any part of them to a subject either reserving or not as he pleases a general right of fishery to all his subjects. The Plaintiff ought not to be called upon to prescribe for a right of fishery over that which is admitted to be his own, for when once it is established that the *locus in quo* belongs to the Plaintiff, it must be presumed to be exclusively his, unless some inconsistent right is set up by the Defendant. The common law right of the subject to go upon the shores of the sea between high and low water mark only applies to cases where no exclusive right is vested in any individual. Now it appears from the passage cited from *Hale's Treatise*, *Hargrave's Tracts*, p. 12. that an exclusive right to the shore may belong to a subject,

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subject, though *prima facie* it is in the king. Indeed in pages 26 and 27 of the same tract, Sir *Mathew Hale* speaking of the sea-shore says, "It may not only belong to a subject in gross, which possibly may suppose a grant before time of memory, but it may be parcel of a manor," and proceeds to mention the several ways by which such a right may be evidenced. To the same effect is *Com. Digest*, tit. *Navigation A.* and the case of the Abbot of *Ramsay*, *Dyer* 326. b. ; and the same is admitted by Lord *Mansfield* in the case of *Carter v. Murcot*, 4 *Burr.* 2164. Although, however, the common law right of the subject should be established to take sea-fish, yet it by no means follows that the subject has a right to take the shells which are thrown upon the sea shore. It is well known that in many parts of *England* much of the various matter which is deposited upon the shore by the sea, belongs to the owners of the adjacent soil, and is disposed of by them to very great advantage. The statute 7 *Jac.* 1. which has been cited in support of the right of the subject to take whatever is found between high and low water mark, seems to afford a contrary inference ; for it is to be observed that it is an enacting and not a declaratory law, and that a peculiar privilege is thereby granted to the men of *Devon* and *Cornwall*, which peculiar privilege it would have been absurd to grant if all the people of *England* had been entitled thereto by common law.

The Court were of opinion that if the Plaintiff had it in his power to abridge the common law right of the subject to take sea-fish, he should have replied that matter specially, and that not having done so, the Plaintiff must succeed upon his plea as far as related to the taking of the fish ; but observed that as no authority had been cited to support his claim to take shells, they should pause before they established a general right of that kind. They therefore offered to allow the Defendant to amend his plea without costs, by striking out his claim to the fish-shells, and shaping his justification in such way as he should be advised. Which offer was accordingly accepted.

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ABERCROMBIE v. PARKHURST.

Replevin of cattle taken in *A.* The Defendant avowed the taking in *A.* under a demise of certain premises of which *B.* was parcel, and because the cattle were damage feasant in *B.* he took them and drove them through *A.* in his way to the pound; and upon general demurrer the avowry was held to be well pleaded.

REPLEVIN of cattle taken in the parish of *Thames Ditton*, in the county of *Surry*, in a certain place there called *Claygate*.

The Defendant avowed the taking of the said cattle in the said declaration mentioned, in the said place in which, &c.; and justly, &c. under a demise from the person seised in fee of certain premises "whereof a certain close called *Helmens*, otherwise *Hellins*, was and from thence hitherto hath been, and still is part and parcel;" into which he entered and took possession: "and being so thereof possessed, because the said cattle in the said declaration mentioned at the said time when, &c. were in the said close called *Helmens*, otherwise *Hellins* parcel, &c. feeding and depasturing upon the grass and herbage of the Defendant there then growing, and otherwise doing damage there to the said Defendant, he the said Defendant well avows the taking of the said cattle in the said declaration mentioned, in the said close called *Helmens*, otherwise *Hellins* parcel, &c. as and for a distress for the said damage so done and doing by the said cattle there, and driving the said cattle in the said declaration mentioned from the said close called *Helmens*, otherwise *Hellins* parcel, &c. in and along the said place in the said declaration mentioned, in which, &c. in order to impound the same as he lawfully might for the cause aforesaid; and justly, &c. and this, &c. wherefore, &c." praying a return of the cattle.

To this there was a general demurrer and joinder.

Shepherd Serjt. in support of the demurrer. The objection to the avowry is that the declaration having stated that the cattle were taken in a certain place called *Claygate*, the Defendant first avows that he did so take them, and then states that he took them in a place called *Helmens*, otherwise *Hellins*, and drove them in and along the place in the declaration mentioned, in order to impound them. Now these latter facts he should have first stated, and then have traversed that he took the cattle at the place in the declaration mentioned; instead of which, according to the form of this avowry, he states that which is inconsistent, namely, first that he took them at *Claygate*, and then that he took them elsewhere. In *Johnson v. Wolljer*, 1 *Str.* 507. it is laid down by *Pratt* Chief Justice,

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tice, that where the party avows at a different place in order to have a return he must traverse the place in the count, because his avowry is inconsistent with it. Indeed the form in which the Defendant should have avowed appears in *Foot's case*, 1 *Salk.* 93. where in replevin for taking a horse *in quodam loco vocat'* the common marsh, the Defendant pleaded that he took it *in quodam loco vocat'* the plot, *absque hoc*, that he took it *in quodam loco vocat'* the common marsh; and then *pro retorno habendo* went on to make consufance for rent arrear: the Plaintiff having pleaded in bar to the consufance, and traversed the seisin of the person under whom the rent was claimed, the Defendant demurred and had judgment, the Court saying that the Plaintiff had no right to traverse the matter of the consufance, and held it a discontinuance. Now in this case it is material to the Plaintiff to take an issue upon the cause of the taking, and yet in the way in which the avowry is pleaded he would be precluded from so doing: for if he had denied the seisin, or the cattle being in *Helmens*, otherwise *Hellins*, it would according to the case in *Salkeld* have been a discontinuance.

Best Serjt. contra, was stopped by the Court.

LORD ALVANLEY Ch. J. Upon principles of common sense this seems to be an avowry very well pleaded. The Defendant has avowed that which was the truth of the case, namely, that though he had the cattle during part of the time in the close called *Claygate*, yet that he originally took them in another close called *Helmens*, otherwise *Hellins*.

HEATH J. It seems to me that the case cited from *Salkeld* has no application to the present. There the only question related to the place where the cattle were taken, whereas here the dispute between the parties turns upon the cause of taking the cattle.

ROOKE J. The declaration in this case appears to me to have been framed with a view to draw the Defendant into a difficulty. If so it has failed, for the avowry seems to me to be well pleaded.

CHAMBRE J. When the cattle of one man are taken by another, it is not very easy for the former to ascertain in what place they were taken, and therefore he is allowed to allege that they were taken in whatever place he finds the other in possession of them. Now here the declaration having alleged a taking in the close called *Claygate*, the avowry also sets forth a taking in *Claygate*, but shews what kind of a taking that was. With respect to the case in *Salkeld*, there was no taking at all in the place laid in the declaration,

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declaration, and when the Defendant had pleaded in abatement to the place, and put in a formal conusance *pro retorno habendo*, it is most clear that the Plaintiff had no right to traverse the matter of the conusance. But in this case the Plaintiff was at liberty to traverse any part of the avowry which he might think proper.

Shepherd then applied to the Court for leave to amend;

But *The Court* being of opinion that the demurrer was frivolous, refused his application, and gave

Judgment for the avowant (a).

(a) See note 1. by *Williams* Serjt. on the case of *Potter v. North*, 1 *Saund.* 347. from which and the authorities there cited, this avowry appears to be pleaded in the usual manner.

June 23d. HENRY SMITH v. SAMUEL WHALLEY and THOMAS ALLPORT.

An agreement between parties to a suit in Chancery binding themselves, their executors, and administrators, made an order of that Court and acted upon therein as such, may be the ground of an *assumpsit* at law.

ASSUMPSIT on a special agreement. The cause coming on to be tried at the Sittings after *Easter* Term before Lord *Alvanley* Ch. J. a verdict was found for the Plaintiff for 754 *l.* 3 *s.* 8 *d.* subject to the opinion of this Court upon a case which stated in substance as follows.

A cause being depending in the Court of Chancery, in which *John Doyley* was Plaintiff, and *Henry Smith* (the present Plaintiff), *John Dunkin*, and *Edward Glover*, Defendants, an agreement was entered into between the Plaintiff and Defendants, entitled as follows: "In Chancery. Between *John Doyley* Plaintiff, *Henry Smith*, *John Dunkin*, and *Edward Glover*, Defendants." The agreement recited an order of the Chancellor for the payment of certain sums of money lodged in the Bank to the credit of the cause, and that one *Charles Harrison*, former solicitor in the cause (since become a bankrupt) should deliver his bill of fees, and that it should be referred to a master to tax the same, till which time payment should be reserved; and further reciting, that a bill had been delivered, whereby there appeared to be a balance of 1601 *l.* 5 *s.* due from the said *Henry Smith* to *Samuel Whalley* and *Thomas Allport*, assignees of the said *Charles Harrison*, subject to taxation not then made; and further reciting, that a further sum had late-

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ly been paid into the Bank to the credit of the cause, for which the said *Henry Smith* had applied to the Court; and that the matter was adjourned until it could be ascertained what the said *Charles Harrison* had received on account of his fees; and that upon the said matter afterwards coming on to be heard, it was referred to S. C. C. Esq. to inquire what bills of fees of the said *Charles Harrison* were a lien upon the fund, placed to the credit of the cause, and what the said *Henry Smith* was personally liable to pay; and that after such inquiry had, such further order should be made as should be just; and further reciting, that instead of prosecuting such inquiry, the said *Henry Smith* and the assignees had come to an agreement that the sum placed in the Bank should be divided into equal moieties, one moiety to be paid to *Henry Smith* to his own use, and the other to the assignees on account of the fees, and in part payment of what should be found due by the master's report; that until such report all further sums paid into the Bank should also be divided into equal moieties, one moiety to the said *Henry Smith*, and the other not exceeding, with the before-mentioned moiety, 1000 *l.* to the said assignees, until the said fees should be paid, but subject to taxation as aforesaid, unless a compromise should take place; that if after the master's report there should be found due to the assignees more than they should have received, pursuant to the said agreement, all further sums to be paid into the Bank should be divided in like manner until the assignees should be paid what should be reported due; that in default of sufficient being paid into the Bank to satisfy the assignees, the said *Henry Smith* should pay the deficiency between the fund and the sum reported due; that if after the report made there should not be found due to the assignees so much as they should have received pursuant to the agreement, they should pay to the said *Henry Smith* the difference between that money and the sum reported due; that the assignees, in case they should divide among the creditors of the said *Charles Harrison* the money to be received pursuant to the said agreement before the master's report should be obtained, should be personally responsible to the said *Henry Smith* for what money should be received above what should be reported due to them; that all the matters aforesaid might be made a rule or order of the Court of Chancery, and should be obeyed and observed as such by the said parties thereto; the agreement concluded with these words: "And for the true performance of this agreement on the part of the said *Henry Smith*, he doth hereby bind himself,

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“ his executors and administrators, unto the said *Samuel Whalley*
“ and *Thomas Allport*, their executors, administrators, and assigns,
“ and for the true performance of this agreement on the part of
“ the said *Samuel Whalley* and *Thomas Allport*, they the said *Samuel Whalley* and *Thomas Allport* do and each of them doth hereby bind themselves and himself, their several and respective executors and administrators, unto the said *Henry Smith*, his executors, administrators, and assigns. Witness their hands,” &c.

The above agreement was afterwards made a rule of the Court of Chancery, and in pursuance thereof several orders of the said Court were made, directing sums paid into the Bank to the credit of the cause to be divided in equal moieties between the said *Henry Smith* and the assignees, by virtue of which the assignees afterwards received in the whole the sum of 937 *l.* 12 *s.* 1 *d.* The master to whom the bill of fees was referred taxed the same at 1795 *l.* 10 *s.* 10 *d.* and also reported that the said *Charles Harrison* was indebted to the said *Henry Smith*, in respect of sums received for his use, 1612 *l.* 2 *s.* 5 *d.* which being deducted from 1795 *l.* 10 *s.* 10 *d.* at which he had taxed the bill, there remained due to the assignees, in respect of the said bill, the sum of 183 *l.* 8 *s.* 5 *d.* The action was brought to recover 754 *l.* 3 *s.* 8 *d.* being the difference between the said sum of 937 *l.* 12 *s.* 1 *d.* received by the assignees, and the sum of 183 *l.* 3 *s.* 5 *d.* due to them in respect of the bill.

The question for the opinion of the Court was, Whether this action was maintainable? If the Court should be of that opinion, the verdict to stand, and judgment to be entered for the Plaintiff. If the Court should be of a contrary opinion, then a nonsuit to be entered.

Clayton Serjt. for the Defendants now contended, that the agreement on which the present action was brought was merely a proceeding in the course of a suit in Chancery, and that the money, if due, was only due under the order of that Court, and therefore not the ground of an assumpsit at common law; he cited *Emerson v. Lasbley*, 2 *H. Bl.* 248. where it was held, that *assumpsit* would not lie to recover costs ordered to be paid under a rule of an inferior court in the course of a suit there, even though the inferior court could not compel the party on whom the order was made to pay them, because he lived out of the jurisdiction of the court; and observed that the present was an attempt for which there was no precedent.

Onslow Serjt. *contra* was stopped

By the Court, who said, that though the general rule was clear that the mere order of another court was not a good ground of

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ly been paid into the Bank to the credit of the cause, for which the said *Henry Smith* had applied to the Court; and that the matter was adjourned until it could be ascertained what the said *Charles Harrifon* had received on account of his fees; and that upon the said matter afterwards coming on to be heard, it was referred to S. C. C. Esq. to inquire what bills of fees of the said *Charles Harrifon* were a lien upon the fund, placed to the credit of the cause, and what the said *Henry Smith* was personally liable to pay; and that after such inquiry had, such further order should be made as should be just; and further reciting, that instead of prosecuting such inquiry, the said *Henry Smith* and the assignees had come to an agreement that the sum placed in the Bank should be divided into equal moieties, one moiety to be paid to *Henry Smith* to his own use, and the other to the assignees on account of the fees, and in part payment of what should be found due by the master's report; that until such report all further sums paid into the Bank should also be divided into equal moieties, one moiety to the said *Henry Smith*, and the other not exceeding, with the before-mentioned moiety, 1000*l.* to the said assignees, until the said fees should be paid, but subject to taxation as aforesaid, unless a compromise should take place; that if after the master's report there should be found due to the assignees more than they should have received, pursuant to the said agreement, all further sums to be paid into the Bank should be divided in like manner until the assignees should be paid what should be reported due; that in default of sufficient being paid into the Bank to satisfy the assignees, the said *Henry Smith* should pay the deficiency between the fund and the sum reported due; that if after the report made there should not be found due to the assignees so much as they should have received pursuant to the agreement, they should pay to the said *Henry Smith* the difference between that money and the sum reported due; that the assignees, in case they should divide among the creditors of the said *Charles Harrifon* the money to be received pursuant to the said agreement before the master's report should be obtained, should be personally responsible to the said *Henry Smith* for what money should be received above what should be reported due to them; that all the matters aforesaid might be made a rule or order of the Court of Chancery, and should be obeyed and observed as such by the said parties thereto; the agreement concluded with these words: "And for the true performance of this agreement on the part of the said *Henry Smith*, he doth hereby bind himself,

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The question for the opinion of the Court was, Whether this action was maintainable? If the Court should be of that opinion, the verdict to stand, and judgment to be entered for the Plaintiff. If the Court should be of a contrary opinion, then a nonsuit to be entered.

Clayton Serjt. for the Defendants now contended, that the agreement on which the present action was brought was merely a proceeding in the course of a suit in Chancery, and that the money, if due, was only due under the order of that Court, and therefore not the ground of an assumpsit at common law; he cited *Emeryson v. Lasbley*, 2 *H. Bl.* 248, where it was held, that *assumpsit* would not lie to recover costs ordered to be paid under a rule of an inferior court in the course of a suit there, even though the inferior court could not compel the party on whom the order was made to pay them, because he lived out of the jurisdiction of the court; and observed that the present was an attempt for which there was no precedent.

Onslow Serjt. contra was stopped

By the Court, who said, that though the general rule was clear

action, yet that in the present instance the Defendants had, by the terms of their agreement, raised a sufficient ground of *assumpsit* against themselves.

Postea to the Plaintiff.

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SEALE v. BARTER and Another.

June 25th.

THIS case was sent by the Lord Chancellor for the opinion of the Court.

John Seale by his will, dated the 11th of *February* 1774, devised to his wife for life his messuage *Barton* farm, and demesne lands called *Mount Boon*, (with the furniture, stock, &c. also for her life,) and an annuity of 50*l.* for her life charged upon a messuage called *Coombe*, with power to distrain in case of non-payment; he then devised to *Richard Harris* and his heirs, all his manors, lordships, messuages, lands, tenements, houses, hereditaments, and premises, with their appurtenances, in the county of *Devon*, to have and to hold the same to the said *R. H.*, his executors, administrators, and assigns, for a term of 200 years, without impeachment of waste upon trust, for the purposes and under the provisos thereafter mentioned, and from and after the determination of the said term upon trust and to the use of the said *R. H.* during the life of his only son *John Seale*, to support contingent remainders, nevertheless to permit his said son *J. S.* to receive the rents and profits during his life without impeachment of waste, and from and after his decease to the use of the 1st son of the said *J. S.* to be begotten on the body of such woman as he should thereafter happen to marry, and the heirs male of such 1st son lawfully issuing; and for want and in default of such issue then to the use of the 2d son in like manner, and so to the 3d, 4th, and every other son and sons of the said *J. S.* and the heirs male of the bodies of every such son and sons lawfully issuing, the eldest of every such son and sons, and

A. devised all his estates in the county of *D.* to a trustee for 200 years to the use of the trustee during the life of his son *J. S.* to preserve contingent remainders, nevertheless to permit *J. S.* to receive the rents and profits, and after his decease to the use of the 1st son of the said *J. S.* to be begotten on the body of the woman as he should happen to marry, and the heirs male of such 1st son, and for want of such issue to the use of the 2d, 3d, 4th, and every other son of *J. S.* and the heirs male of their bodies in succession, and for want of such issue

male then to the use of his daughter *E. S.* her heirs and assigns for ever; with a residuary clause in favour of *J. S.* The testator afterwards made a codicil whereby he devised all his estates to his son *J. S.* and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper; and for default of such issue then to his daughter *E. S.* and her children lawfully to be begotten, with a similar power: and in default of such issue to *J. S.* and *E. S.* equally between them; and he further provided that a settlement of 200 *per annum* should be made on any woman whom his son should happen to marry; and that his estates should be chargeable therewith. At the time of making the codicil *J. S.* was married, but had no child. Held that the codicil was to be construed independent of the will: and that under the codicil *J. S.* took an estate tail, with a power to settle the estates on all or any of his issue in such way as he should appoint; and thereby depriving the estate tail so far as it should be inconsistent with such settlement.

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the heirs male of his and their body and bodies always to take place and be preferred before the younger of such son and sons, as they and every other of them should be in seniority of age and priority of birth; and for want and in default of such issue male of his said son *J. S.* then upon trust, and to and for the only use and behoof of his daughter *Elizabeth Seale*, her heirs and assigns for ever, and to and for no other use, intent, and purpose whatsoever; and as to the said term of 200 years he declared that it should be lawful for the said *R. H.*, when his daughter *E. S.* should marry, to raise a portion of 4000*l.* to be paid to her, and until that time to raise the annual sum of 250*l.* to be paid to her for her maintenance: after charging all his estates in the county of *Devon* with the payment of his debts, he devised all the rest, residue, and remainder of his lands and tenements not thereinbefore devised or disposed of whereof he should die seised in possession, reversion, or remainder, to his son *J. S.* his heirs and assigns, and all the rest of his personalty after payment of his debts and funeral expences, he gave to *R. H.* and made him executor of his will, desiring him to see the same performed according to his true intent and meaning, nevertheless in trust, and to and for the only use and behoof of his said son *J. S.* On the 14th of *February* 1774, the testator made the following codicil to his will: " I *John Seale* of *Mount Boon*, within the parish of *Townstall*, in the county of *Devon*, Esq. do this 14th day of *February* 1774, make and publish this codicil to my last will and testament, in manner and form following: first and principally it is my will and meaning, and I do hereby order and direct that no inventory of my goods and effects at *Mount Boon* be taken after my decease; it is likewise my will that all my lands and estates shall after my decease come to my son *John Seale* and his children lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them, or any of them, as he shall think proper; and for default of such issue, then that all my lands and estates come to my daughter *Elizabeth Seale* and her children lawfully to be begotten, with full power for her my said daughter to settle the same or any part or parts thereof, by will, or otherwise, on them, or such of them as she shall think proper; and in default of such issue, it is my will and meaning that all my estates and lands shall belong to my said son and daughter equally between them, to whom in such case I do hereby give, devise, and bequeath the same: and whereas in and by my will *Richard Harris* is made a trustee for pay-

action, yet that in the present instance the Defendants had, by the terms of their agreement, raised a sufficient ground of *assumpsit* against themselves.

Postea to the Plaintiff.

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June 25th.

THIS case was sent by the Lord Chancellor for the opinion of the Court.

John Seale by his will, dated the 11th of *February* 1774, devised to his wife for life his messuage *Barton* farm, and demesne lands called *Mount Boon*, (with the furniture, stock, &c. also for her life,) and an annuity of 50*l.* for her life charged upon a messuage called *Coombe*, with power to distrain in case of non-payment; he then devised to *Richard Harris* and his heirs, all his manors, lordships, messuages, lands, tenements, houses, hereditaments, and premises, with their appurtenances, in the county of *Devon*, to have and to hold the same to the said *R. H.*, his executors, administrators, and assigns, for a term of 200 years, without impeachment of waste upon trust, for the purposes and under the provisos thereafter mentioned, and from and after the determination of the said term upon trust and to the use of the said *R. H.* during the life of his only son *John Seale*, to support contingent remainders, nevertheless to permit his said son *J. S.* to receive the rents and profits during his life without impeachment of waste, and from and after his decease to the use of the 1st son of the said *J. S.* to be begotten on the body of such woman as he should thereafter happen to marry, and the heirs male of such 1st son lawfully issuing; and for want and in default of such issue then to the use of the 2d son in like manner, and so to the 3d, 4th, and every other son and sons of the said *J. S.* and the heirs male of the bodies of every such son and sons lawfully issuing, the eldest of every such son and sons, and

A. devised all his estates in the county of *D.* to a trustee for 200 years to the use of the trustee during the life of his son *J. S.* to preserve contingent remainders, nevertheless to permit *J. S.* to receive the rents and profits, and after his decease to the use of the 1st son of the said *J. S.* to be begotten on the body of the woman as he should happen to marry, and the heirs male of such 1st son, and for want of such issue to the use of the 2d, 3d, 4th, and every other son of *J. S.* and the heirs male of their bodies in succession, and for want of such issue male then to

the use of his daughter *E. S.* her heirs and assigns for ever; with a residuary clause in favour of *J. S.* The testator afterwards made a codicil whereby he devised all his estates to his son *J. S.* and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper; and for default of such issue then to his daughter *E. S.* and her children lawfully to be begotten, with a similar power: and in default of such issue to *J. S.* and *E. S.* equally between them; and he further provided that a settlement of 200 *per annum* should be made on any woman whom his son should happen to marry; and that his estates should be chargeable therewith. At the time of making the codicil *J. S.* was married, but had no child. Held that the codicil was to be construed independent of the will: and that under the codicil *J. S.* took an estate tail, with a power to settle the estates on all or any of his issue in such way as he should appoint; and thereby determine the estate tail so far as it should be inconsistent with such settlement.

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the heirs male of his and their body and bodies always to take place and be preferred before the younger of such son and sons, as they and every other of them should be in seniority of age and priority of birth; and for want and in default of such issue male of his said son *J. S.* then upon trust, and to and for the only use and behoof of his daughter *Elizabeth Seale*, her heirs and assigns forever, and to and for no other use, intent, and purpose whatsoever; and as to the said term of 200 years he declared that it should be lawful for the said *R. H.*, when his daughter *E. S.* should marry, to raise a portion of 4000*l.* to be paid to her, and until that time to raise the annual sum of 250*l.* to be paid to her for her maintenance: after charging all his estates in the county of *Devon* with the payment of his debts, he devised all the rest, residue, and remainder of his lands and tenements not thereinbefore devised or disposed of whereof he should die seized in possession, reversion, or remainder, to his son *J. S.* his heirs and assigns, and all the rest of his personalty after payment of his debts and funeral expences, he gave to *R. H.* and made him executor of his will, desiring him to see the same performed according to his true intent and meaning, nevertheless in trust, and to and for the only use and behoof of his said son *J. S.* On the 14th of *February* 1774, the testator made the following codicil to his will: “ I *John Seale* of *Mount Boon*, within the parish of *Townshall*, in the county of *Devon*, Esq. do this 14th day of *February* 1774, make and publish this codicil to my last will and testament, in manner and form following: first and principally it is my will and meaning, and I do hereby order and direct that no inventory of my goods and effects at *Mount Boon* be taken after my decease; it is likewise my will that all my lands and estates shall after my decease come to my son *John Seale* and his children lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them, or any of them, as he shall think proper; and for default of such issue, then that all my lands and estates come to my daughter *Elizabeth Seale* and her children lawfully to be begotten, with full power for her my said daughter to settle the same or any part or parts thereof, by will or otherwise, on them, or such of them as she shall think proper; and in default of such issue, it is my will and meaning that all my estates and lands shall belong to my said son and daughter equally between them, to whom in such case I do hereby give, devise, and bequeath the same: and whereas in and by my will *Richard Harris* is made a trustee for pay-

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ment of my debts, legacies, and expences, I do hereby direct and order that if my said son *John Seale* can raise the money otherwise, it shall be at his option. My will further is, that a settlement of two hundred pounds a-year shall be made upon any woman my son *John Seale* may happen to marry, and that my estates, or so much of them as he shall think proper, be chargeable with the payment thereof: and lastly, it is my desire that this my codicil be annexed to and made part of my last will and testament to all intents and purposes." The testator being seized of or entitled to considerable lands and tenements in the county of *Devon*, and of no other real estates whatsoever except a messuage or tenement in the parish of *St. Sedwell*, in the county of the city of *Exeter*, died in *September 1777*; leaving only two children (*viz.*) the said *John Seale* his only son, and the said *Elizabeth* his daughter, who was afterwards married, and is since dead, having left a son, her only child, now in minority. At the time of making the codicil *John Seale* the testator's son was married, but had no child, but afterwards in *February 1777*, in the testator's lifetime, *John Seale* the son had a daughter born, his eldest child (who is now living and lately married), and he has since had several other children, of whom his eldest son is now in minority.

The question for the opinion of the Court was, What estate or interest did the Plaintiff *John Seale*, the son of the said testator, take under the said will and codicil?

The case was twice argued; first in *Hilary Term* last, by *Best* Serjt. for the Plaintiffs, and *Bayley* Serjt. for the Defendants; and again in this Term, by *Shepherd* Serjt. for the former, and *Lens* Serjt. for the latter.

Arguments for the Plaintiffs. *John Seale* the son of the deviser took an estate in tail general, remainder in tail general to *Elizabeth Seale*, remainder in fee to the said *John* and *Elizabeth Seale* as tenants in common. The question in this case turns upon the expressions introduced into the codicil, by which the testator devises all his lands and estates to *J. S.* and his children lawfully to be begotten, with full power for him to settle the estates, or any part or parts thereof, by will or otherwise on them or such of them as he shall think proper; and for default of such issue then, that the estates shall go to his daughter *E. S.* and her children lawfully to be begotten, with the same power as to the son; and in default of such issue, to *J. S.* and *E. S.* equally between them. Unless these

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expressions be construed in the way contended for by the Plaintiffs, it does not seem that the intention of the testator will be effectuated: and indeed the authorities applicable to the words of this codicil call for such a construction. A devise to a man and his children or issues, if he hath not any issue at the time of the devise, is sufficient to give an estate tail, for otherwise the children could not take. *Wylde's case*, 6 Co. 16, 17. Now, in the present case, at the time of the devise made, J. S. had no children. So in 1 And. pl. 110. a devise of land to one for life, and after his decease to the men children of his body, and if he died without men children of his body then over, was held to give an estate in tail male. Indeed all the cases in which the words "sons," or "children," or "issue," have been used to describe the limitation, and an estate tail has been raised by the Court, are authorities to shew, that in this case also an estate tail must be raised. In *Sunday's case*, 9 Co. 128. where a devise was to T. and if he marry then his son to have the estate, and if he have no issue male, then over to another person, T. took an estate tail. And in *King v. Melling*, 1 Vent. 216. 225. 2 Lev. 58. S. C. a devise to *Bernard Melling* for his life, and after his death to the issue of his body, was held to give him an estate tail. And though in that case there was a power to B. M. to make a jointure of all the premises to a second wife, Lord Hale was of opinion that that circumstance did not defeat the estate tail, which affords an answer to any argument which may be raised from the power given in this case. So in *Wharton v. Gresham*, 2 Bl. 1083. the words to J. W. and his sons in tail male, and in default of such issue over gave to J. W. who had no issue at the time of the devise, an estate in tail male. In the present case the devise is to J. S. and his children, and in default of such issue then only is it to go over; which shews that the children were intended to take an estate of inheritance, which they could not do but through their father, nor through him unless he took an estate tail. In *Davies v. Stevens*, Doug. 320. there was a devise of the fee simple and inheritance to *William* and his child or children for ever; and Lord Mansfield said the meaning is the same as if the expression had been to *William* and his heirs, that is to say, his children or his issue. The words "for ever" make no difference, for *William's* issue might last for ever. Now if in that case the word "children" was held synonymous to issue in order to restrain the devise to an estate tail, there is no reason why in

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this case it may not be held to bear the same sense, in order to enlarge the devise to an estate tail. The general intention of the testator was, that the estate should not go over to *L. S.* until after an indefinite failure of the issue of *J. S.*; but if the word “children” is held to be a mere *designatio personæ*, though there was no child *in esse* at that time, what is there to give to the children any thing more than estates for life? The intent of the testator, therefore, can only be effectuated in two ways; namely, by giving an estate tail to *J. S.* or by implying cross remainders between the children. In order to do the former by implication, the Court have gone great lengths, as in *Robinson v. Robinson*, 1 *Burr.* 38. *Roe d. Dodson v. Greve*, 2 *Willf.* 322. *Hodges v. Middleton*, *Boug.* 431. *Daintry v. Daintry*, 6 *Term Rep.* 370. *Doe d. Candler v. Smith*, 7 *Term Rep.* 531. and *Doe d. Cock v. Cooper*, 1 *East* 229. But cross-remainders among the children cannot be raised without raising a previous estate of inheritance, which in this case cannot be done, except through the medium of *J. S.* the devisee, and which when done establishes the Plaintiff’s title. In all the cases in which cross-remainders have been implied, there has been that preliminary step which will be wanting in this case, unless *J. S.* be held to take an estate tail, *viz.* a previous estate of inheritance. *Holmes v. Reynell*, *Sir T. Ray.* 452. *Pollexf.* 425. *Skin.* 17. *Sir T. Jones*, 172. *S. C.* *Wright v. Holford*, *Cowp.* 31. *Doe d. Atherton v. Pyc*, 4 *Term Rep.* 710. and *Phippard v. Mansfield*, *Cowp.* 797.

Arguments for the Defendants. • If the question in this case were, whether particular expressions not sufficiently formal in their nature might not be so modelled as to prevent the estate going over contrary to the intent of the testator, then the cases cited might apply. But in order to induce the Court to put such a construction upon this will, that has been assumed in argument which does not necessarily appear, namely, that the testator meant his estate to go in succession. The better construction of the devise seems to be, that *John Seale* took an estate for life, with remainder in fee to him and his sister *Elizabeth Seale*, depending upon the two contingencies, either of *John Seale* or of *Elizabeth Seale* having children. By the codicil a power is given to the devisee to settle the estate or any part thereof on such of the children as he shall think proper. Now if this be the case, why should the Court labour to effectuate a supposed interest of the testator to create an estate tail, when the power vested in the devisee enables him to put an

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end to all the consequences resulting from such an estate. But if this mode of construction be objectionable, still it may be held that *J. S.* took an estate to himself for life, with remainder in fee to his children, if he had any, for it is not limited to all the children, but to such of them as *J. S.* shall appoint; and in several cases the word "estates" has been held to convey a fee. Indeed in this case the probability of the word "estates" being used in that view, is particularly strong, because in the ultimate remainder to *J. S.* and *E. S.* which appears clearly to have been intended to be a remainder in fee, the word "estates" is again used, and no other word capable of carrying a fee. With respect to the case of *King v. Melling*, the power introduced there was only a power to jointure, which is very different from such a power as this to limit the whole estate: although the power therefore in that case was held not to defeat the estate tail, yet it is no authority in the present instance. It is observable also that the testator has had no anxiety to prevent the estate from being split into different portions, since the ultimate remainder in fee being given to *J. S.* and *E. S.* the heirs of both, and not the heirs of one only, would ultimately be entitled to take. In order to ascertain the intention of the testator, it is necessary to look at the will, which is dated only three days prior to the codicil. In the will the Testator gives to *J. S.* an estate for life only, with limitations to his children in strict settlement. Now the only alteration which appears to have been intended by the codicil, is, that of enabling *J. S.* to determine in what manner his children should take, but not to enlarge the estate originally devised to *J. S.* himself. It is not necessary to go through all the cases which have been cited: since most of them only diversify the principle which was laid down in *King v. Melling*, and *Robinson v. Robinson*, namely, that the general intent of the Testator shall prevail, where that intent is apparent. In this case no such intent as is contended for by the other side being apparent, the Court will allow the words to operate as they stand. Indeed if it were necessary that cross-remainders should be raised in this case, there are words sufficient for that purpose, namely, "in default of such issue:" and it is not necessary in such case that the children should take an estate of inheritance through the father, for cross-remainders may be raised where the father takes only an estate for life. In the case of *Doe d. Davy v. Burnfall*, 6 Term Rep. 30. and *ante*, vol. i. p. 215. the devise was somewhat similar to the present,

present, being to *M. O.* and the issue of her body as tenants in common, but in default of such issue then over, in which case *M. O.* was held to take only an estate for life, with contingent remainders to the issue of her body. In *Goodright v. Dunham*, *Doug.* 267. Lord *Mansfield* says, ‘the words “in case he dies without issue” being tacked to the preceding clause (by which the testator had devised to his son for life, and after his death to all and every his children equally, and to their heirs) must mean the same thing as in case he die without children.’ So in this case the words “such issue” must mean such children as he had before mentioned; which destroys the only argument from which an estate tail can be inferred.

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Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY Ch. J. who after stating the will proceeded thus:—Under this will the estate was given to the testator’s son for life, with remainder in tail male to his children by any after-taken wife, remainder to the testator’s daughter in fee. This will is stated in the case to bear date on the 11th of *February* 1774; and the case further states, but whether accurately or not I much doubt, that on the 14th of *February* 1774, only three days after the date of the will, the testator made the codicil in question. It is stated that at the time when the testator made this codicil, *John Seale* the testator’s son was married, which seems to exclude the idea of his having been married at the date of the will, and indeed the expression in the will respecting children by any woman whom the testator’s son should thereafter happen to marry, implies that no marriage was in immediate contemplation at the time when that will was made. It is also stated that at the time when the codicil was made the testator’s son had no children, but that afterwards during the testator’s life he had children, of whom the eldest is now in minority. The question submitted to this Court by the Lord Chancellor is, What estate the testator’s son *John Seale* took under the will and codicil? Notwithstanding the apparent inaccuracy in the statement of dates, it will not appear material that the case should be altered when the grounds are known upon which we all concur in thinking that the testator’s son took an estate tail. If we could by any possibility have referred the limitation in the codicil to the will, seeing the disposition made in the latter to the children of the testator’s son, we should have been desirous to apply

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ply the word "children" in the codicil, to the same children who are described in the will; and should have been inclined to suppose that the testator did not intend by the codicil to disturb the dispositions of the will, but only to give a power to his son to settle the estates upon such of the children mentioned in the will as he should think proper. And when I first read this case I was inclined to think that the true construction. But on further consideration I think that cannot be the case: for by the will the testator had only given an estate in tail male to the first and other sons of his son, with a remainder in fee to his daughter, without any particular limitation to the daughter's children: and when we find in the codicil the same limitation to the children of the daughter as to the children of the son, it is impossible to apply the word "children" in the codicil to the same persons who are described by that word in the will. We are therefore of opinion that the codicil must be taken independent of the will; and that it is no longer to be considered as a codicil but as a substantive will; and the only question remaining for our consideration is, What estate the testator's son took under the words of that codicil? It has been insisted on the part of the Plaintiff that the words of the codicil convey an estate tail: and *Wylde's case* (which is the leading case upon this subject) was cited and relied on. I will shortly state that case as it is reported in 6 Co. 16. and in *Moore* 397. under the name of *Richardson v. Yardley*: for though the titles of the cases are different, and one is stated to have been in the 41 Eliz. and the other in the 37 Eliz. it is hardly possible to consider them as different cases, especially as the name of *Wylde* occurs in both, and the circumstances are so nearly the same: and indeed in some books where the report in *Moore* has been cited, it has been said that the same case was better reported in *Coke*. According to the report in *Coke*, the devise was of land to A. for life, remainder to B. and the heirs of his body, remainder to *Rowland Wylde* and his wife, and after their decease to their children; *Rowland* and his wife then having a son and a daughter. It was resolved that *Rowland Wylde* and his wife took only joint estates for their lives: but a case was there put as good law, that if A. devise to B. and his children or issues, and he hath not any issue at the time of the devise, the same is an estate tail; and a case is cited from Serjeant *Bendloes' Reports*, which was a devise to husband and wife, and the men children of their bodies begotten, and it

did not appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and the heirs of their bodies. According to the report in *Moore, Popham* and *Gawdy* held that *Wylde* took an estate tail, notwithstanding that he had children living at the time of the devise, though *Fenner* and *Glencb* thought it was only an estate for life. It appears therefore that two of the Judges were disposed to think that an estate tail would pass even in a case where children were *in esse* at the date of the will, and they all agreed that if no children had been born it would have been an estate tail. The next case to which I shall allude is that of *King v. Melling*, where the devise was to *Bernard Melling* for life, and after his death to the issue of his body by his second wife, his first being then alive, and for default of such issue over, with a proviso enabling *Bernard Melling* to make a jointure on his second wife; there *Rainsford* and *Twyssden* Js. held that *B. Melling* took only an estate for life, but *Hale* Ch. J. thought that it was an estate tail, and his opinion was afterwards confirmed by all the Judges in the Exchequer Chamber. The case referred to in the argument from *Anderfon*, and *Sonday's* case are also authorities in favour of an estate tail: indeed in the latter case some argument arose on the clause introduced into the will restraining alienation, but it was held to make no difference. I now come to the case of *Wharton v. Gresham*, which appears to me to be very applicable to the present. It was there argued by Serjeant *Glynn* that there was a difference between the words "children" and "sons," the former implying future progeny, the latter not. But the Court were clear, upon the authority of *Wylde's* case, and that in *Anderfon*, and *Sonday's* case, that *John Wharton* (who at the time of the devise had no issue) took an estate tail under a devise "to *J. W.* and to his sons in tail male, and in failure of such issue then over." Now in that case there was some reason to suppose that the testator intended to give an estate tail to the sons as purchasers: but the Court thought that the words "in failure of such issue" were not to be restrained to the sons, but must include all the male posterity of *J. W.* who must therefore take an estate tail. The doctrine laid down in the famous case of *Robinson v. Robinson*, as well as the words of the devise, bear strongly on the present question. Notwithstanding the devise was expressly limited to *Launcelot Hicks* for life, yet as it appeared that the testator by the words "such son as he should have," meant to embrace all his male issue, the Court of *King's Bench* held that *L. H.* took

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an estate tail. It is true that there was some difference of opinion respecting the decision of that case: but when carried into error the judgment of the *King's Bench* received the final approbation of the House of Lords. So in *Roe d. Dodson v. Grew*, where the devise was to *George Grew* for life, and after his decease to the issue male of his body, he having no issue at the time when the will was made, *George Grew* was held to take an estate tail. The only other case which I shall mention is *Hodges v. Middleton*. There the devise was to Mrs. *Ann Middleton* for life, and at her death to her children. Now it appears from the case that Mrs. *Middleton* had seven children at the death of the testatrix, and it is singular enough that Serjeant *Hill* in arguing for the Plaintiff observes, that as the date of the will was only one year previous to the death of the testatrix, probably there were children of Mrs. *M. in esse* at the date of the will. Now if there were children *in esse* at the date of the will, and that there were appears pretty clear, that case is particularly strong, for the Judges certified that they were inclined to think that under the will Mrs. *M.* took an estate tail (a). On the part of the Defendants it has been contended, that admitting the general doctrine that a devise to a man and his children, he having no children at the time of the devise, must embrace all the posterity of the devisee, yet that it appears from the circumstances of this particular case that the testator did not intend so to limit his estate: and in the course of the argument the power given to *John Seale* to settle the estate on such of his children as he should think proper was mainly relied upon, and contended to be inconsistent with a devise of an estate tail to *John Seale* himself. It was urged that the power would be altogether unnecessary if an estate tail were already given, since it would be in the power of the tenant in tail to dispose of the whole estate in such manner as he should think fit, by cutting off the entail. But it may be observed that the power had some operation, since it enabled the devisee to dispose of the estate to his children without going through the forms of a recovery. Independent however of the operation of this power, I think there is a fallacy in the argument: for it supposes that the

(a) Lord Chief Justice *Willis* in delivering the judgment of the Court in *Ginger d. White v. White*, *Willis* 353. (in which case most of the authorities cited in the present case are commented upon), makes this observation on *Wylde's* case: "If a devise be to *A.* and his children, if there be no children then in being it gives an estate tail, because the devise is in words *de*

presenti, and there being no children they must take by way of limitation; but if a devise be to *A.* and after his decease to his children, *A.* has only an estate for life, because then the words plainly shew that the children were intended to take by way of remainder." With this latter position, the opinion of the Court in *Hodges v. Middleton* seems inconsistent.

testator knew the legal consequences of all the words which he had used, and all the privileges attached to a tenancy in tail. The same argument was urged in the great case of *Perryn v. Blake*; and in the Exchequer Chamber Mr. Baron *Perrot* exposed the fallacy of it: and it was agreed that a testator cannot be presumed to know the different privileges annexed to the several estates of tenant for life or tenant in tail. The true question to be considered is, whether the testator meant to give the estate to *John Seale* and his posterity? Probably if it had been asked of the testator whether he meant that his son should have a power to defeat the limitation, he would have answered, that he did not understand the effect of an estate tail, but that he wished the estate to go to his son and his posterity. If he meant to give his estate to his son and his posterity generally, it is an estate tail; on the other hand, if he meant to give it first to his son, and afterwards to select the sons and daughters of his son in order to give the estate to them, the son took only an estate for life. Now we are of opinion upon all the authorities, that the words "children lawfully to be begotten," in this case, are not to be considered as words of purchase, but that the intention of the testator was to give his estate to his son and the issue of his body generally. And though perhaps the power would not have been added had the testator known the full effect of the words which he has used, yet we do not think the power sufficient to control the effect which, according to the authorities referred to, has always been given to those words. We give no opinion what would have been the case if there had been children born at the time of the devise. We shall make a certificate to the Lord Chancellor, that *John Seale* under the codicil took an estate tail, with a power of appointment annexed.

Accordingly the following certificate was afterwards sent to the Lord Chancellor:

"We have heard the arguments of Counsel upon this case, and are of opinion that under the codicil *John Seale* the son took an estate tail in the testator's real estates, with a power by deed or by his last will to settle the said estates, or any part thereof, upon all or any of his issue, for such estates and interests as he should thereby appoint, and thereby to determine the estate tail devised to him by the testator, so far as the same should be inconsistent with such settlement.

ALVANLEY.

J. HEATH.

G. ROOKE.

A. CHAMBRE."

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SIMPSON v. SCALES.

If an act of Parliament for enclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower Commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted; an ancient towing path upon the bank of the river, though not set out by the Commissioners, still subsists, for it is not within their jurisdiction.

TRESPASS for taking and impounding the Plaintiff's horse drawing certain boats at *Northwold* in the county of *Norfolk*. Plea that a certain close called *Armingbay Hill* (the *locus in quo*) was the freehold of the Defendant, and that the horse was there taken damage feasant. Replication, that the said close from time whereof, &c. hath lain open and adjoining to a certain river called the *Wiffey*, the said river being a navigable river between *Stoke* and *Hilgay*, and that the owners of boats, &c. navigating the same have been accustomed to pass and repass in, through, and over the said close with their horses, &c. for the purpose of haling and towing the said boats along the said river. Wherefore the Plaintiff entered the said close with the said horse for the purpose of haling and towing the said boats for the more convenient navigation of the said river; when Defendant of his own wrong took the horse. Rejoinder, taking issue on the right of way. Verdict for the Plaintiff, with 40s. damages, subject to be reduced to one shilling if the Court should be of opinion with the Defendant on the following case:

The Defendant is the occupier and owner of the close mentioned in the pleadings, lying in the parish of *Northwold* on the north bank of the river *Wiffey*, which is a navigable river from *Stoke* in *Norfolk* to *Hilgay* in the same county. On the south-side of the river opposite to *Northwold* there is a regular towing-path; but for the convenient navigation of the river, it is frequently necessary to change the horses from one side of the river to the other. The owners of boats and vessels navigating the said river have time immemorial been accustomed to pass and repass in, through, and over the said close in question with their horses for the purpose of haling their said boats and vessels along the said river, which they had constantly done without interruption, whenever necessity or convenience required; and without such occasional towing or haling it would be impossible to navigate the same. By an act of Parliament passed in the year 1796 for inclosing and allotting the commons and waste lands of the parish of *Northwold*, the Commissioners therein named are directed to set out and appoint such public and private roads and ways, and to order and direct such bridges,

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bridges, ditches, banks, wiles, gates, bars, inlets, drains, water-courses, and other works, as they shall think necessary and proper; and it is enacted, that when the said public roads and ways shall be so set out, appointed, and made, it shall not be lawful for any person or persons to use any other roads or ways, either public or private, within or upon the lands thereby directed to be divided and allotted, on foot, or with horses, cattle, or carriages; and that all roads and ways which shall not be so set out and appointed as the roads or ways within or upon the lands thereby directed to be divided and allotted, shall be deemed to be part of the lands and grounds thereby directed to be divided and allotted, and shall be divided and allotted accordingly. The said act provides, that the said Commissioners shall, before the setting out any roads or highways in pursuance of the act, cause a notice of their intention, and a description of all the public ways and roads intended to be set out and appointed by them, to be affixed upon the principal door of the parish church of *Northwold*, and to be inserted in a *Norfolk* newspaper 21 days at least before such roads or highways should be set out; and if any person or persons should have any objection to the said roads or highways, or any of them, or should propose any other roads or highways, such person or persons should deliver their objections or proposals in writing to the said Commissioners at the times therein mentioned, and that the said Commissioners should thereupon hear the allegations and evidence offered and produced to them in support of the said objections or proposals; and after due consideration thereof, should set out and appoint all or any part of the public roads or highways described in the said notice, or such other public highways or roads in lieu thereof as they should think fit. The Commissioners did set out and appoint certain public and private roads accordingly, which roads were made and completed; and before the setting out of the said roads, the notice required by the act was duly given, and the other directions of the act complied with on the part of the Commissioners. No road was set out, in, or over the said close, and no person attended at any meeting of the said Commissioners to prove a right, or to assert a claim to the road in question. The close over which this road is claimed was, before and until the passing of the act of Parliament, part of the commons or waste land of the said parish of *Northwold*, and was inclosed and allotted by the Commissioners under the said act to the Reverend *Richard Whist*,

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an owner of lands and commonable messuages within the said parish, and was before the time, in the declaration mentioned, sold by him for a valuable consideration to the Defendant. The Plaintiff's horse at the time he was taken by the Defendant was in the said close, and employed in haling the Plaintiff's barges on the said river *Wiffey*.

Sellon Serjt. was to have argued in support of the verdict ;

But *Praed* Serjt. for the Defendant being called upon by the Court, contended, that the object of the act of Parliament being to discharge the land to be divided from all unnecessary burthens, this towing path, which at the time of the passing of the act was an existing public way, not having been set out and appointed by the Commissioners as such, must now be taken to have been deemed unnecessary by them, and ought therefore to be considered as part of the lands divided ; that this argument was strengthened by the circumstance stated in the case, of the existence of a towing-path on the other side of the river ; and that although arguments of inconvenience might have weight in a case where the words of an act of Parliament were doubtful, yet that in the present, where the directions of the act were positive, such arguments could not prevail.

Lord ALVANLEY Ch. J. I think there is no difficulty in the construction of this act of Parliament. This act authorises certain Commissioners to enclose certain lands, and to set out such ways as they should deem necessary, and to shut up such as they should deem unnecessary. Before the passing of this act there was a navigable river bounded on the south by enclosed lands, over which there was a towing-path, and on the north by unenclosed lands, over which the public had also been accustomed to pass for the purpose of towing. The Commissioners have set out no towing path. Now it appears to me that the reason of this omission must have been, that they did not consider the matter to be within their jurisdiction. It was not the intention of the Legislature to empower the Commissioners to shut up one public road without setting out another in lieu of it. In cases of roads it may be very easy to substitute one for another ; and the Commissioners have done so in the present instance : but a towing-path can exist no where but upon the bank of the river. It would therefore be monstrous to hold the public precluded from their right to pass along the north bank of this river, when it neither appears to have been the intention

of the Legislature to empower the Commissioners to interfere with that right, nor do the Commissioners themselves appear to have had the towing path in their contemplation when they proceeded to make their allotment.

HEATH J. This power of shutting up ways was given to the Commissioners, in order to prevent the waste of ground arising from a multiplicity of roads. But it never was intended to include the towing path in that general power; and even if it had been included, the Commissioners must have set out some other towing path in lieu of that which was taken away.

ROOKE J. This act contains the usual saving of the King's rights. If therefore the Commissioners have set out no other towing path in lieu of that which before existed, I should hold that the right of navigating this river, and of towing barges upon it, must still be reserved to the King. If one road be set out for another the public is not injured: but if the towing path be taken away the public is thereby deprived of the power of navigating the river. Supposing therefore that the towing path could be considered as falling within the words of the act, I should still be inclined to hold, that the right was saved by the exception in favour of the King, who is the protector of all these public rights.

CHAMBRE J. I think that conclusions from acts of Parliament against the rights either of the public or of individuals ought not to be enforced by too strict an adherence to the letter. In my view of the case, it was not the intention of the Legislature to give any jurisdiction to the Commissioners respecting any rights of way which form part of the navigation of the river. The ways intended to be included were ways in the popular sense of the word, leading from one vill to another. But this towing path is only a part of that way which consists of the whole navigation of the river. The Commissioners have so considered it, and I think they have put the right construction upon the act.

Per Curiam,

Let the verdict stand.

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(In the HOUSE OF LORDS.)

June 29th. Between the Right Honourable MARY ELEANOR BOWES (commonly called Countess of STRATHMORE), by W. LYON Esq. her next friend, - - - - - Plaintiff,

AND

ANDREW ROBINSON BOWES Esq. and WM. BIRCH, HENRY BOURN, and GEORGE STEPHENS, - - - Defendants.

And between ANDREW ROBINSON BOWES Esq. - Plaintiff,

AND

The Right Honourable MARY ELEANOR BOWES (commonly called Countess of STRATHMORE), WM. LYON, CHS. SHUTER, RICHARD HARBORNE, JAMES SETON, MARY MORGAN, and FRANCES BENNETT, - - - Defendants.

On the appeal of the Right Honourable *John Bowes* Earl of *Strathmore*, son and heir of the Right Honourable *Mary Eleanor Bowes* (commonly called Countess of *Strathmore*), deceased.

A. by will devised "all his freehold and copyhold lands, tenements, and hereditaments," in trust for certain purposes, and afterwards purchased new lands: he then made a codicil, whereby after reciting that he had devised "all his freehold and copyhold lands, tenements, and hereditaments" to the trustees

named in the will, he revoked the devise so far as it related to two of the trustees, and devised his "said lands, tenements, and hereditaments" to the other trustees upon the same trust; and concluded with declaring the codicil to be part of his will. Held that the after-purchased lands did not pass.

lifetime,

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lifetime, or after his death, that the same should be in trust for his first and other sons successively in tail male; and for default of such issue then in trust for his daughter *Mary Eleanor Bowes*, afterwards the Countess of *Strathmore*, for her life, without impeachment of waste, except wilful waste in houses; and after the determination of that estate, in trust during her life to support the contingent remainders; and after her death, then in trust for her first and other sons successively in tail male; and for default of such issue, then in trust for all and every her daughters, as tenants in common, and the heirs of their respective bodies; with cross remainders in tail general to the surviving daughter or daughters as tenants in common, in case of one or more of the daughters dying without heirs of their respective bodies; with divers remainders over. After making the said will; and before making the codicil in question, the testator purchased several estates, and particularly the said testator, in the year 1754, purchased an undivided third part of a certain freehold estate in the county of *Durham*, which was sold under a decree of the Court of Chancery, and was seised in fee thereof at the time of his death. The testator afterwards made a codicil to his will, bearing date the 20th day of *October* 1758, which, with the testator's signature and the attestation thereto, is in the words and figures following (that is to say): "Whereas by
" my last will and testament, bearing date the seventh of *February*
" 1749, I have given and devised all my freehold and copyhold
" manors, messuages, lands, tenements, and hereditaments what-
" soever, not held on mortgage or in trust for any other persons,
" nor held by any lease or leases for lives, to my dear wife *Mary*
" *Bowes*, her father *Edward Gilbert Esq.* my sister *Elizabeth*
" *Bowes*, my sister *Jane Bowes*, my friends the Honourable Sir
" *Hugh Smithson* of *Stanwick*, in the County of *York*, Baronet,
" and *Thomas Rudd*, of the city of *Durham Esq.* their heirs and
" assigns, and to the use of them, their heirs and assigns, upon the
" trusts, intents, and purposes therein mentioned; now I do here-
" by revoke and make void all my above devise, so far as it relates
" to the above Sir *Hugh Smithson*, now Earl of *Northumberland*,
" and *Thomas Rudd*, and their heirs; and I do hereby give and
" devise my said lands, tenements, and hereditaments, unto the
" above-named *Mary Bowes*, my said wife, *Edward Gilbert*, and
" my sisters *Elizabeth Bowes* and *Jane Bowes*, their heirs and
" assigns, upon the same trusts, intents, and purposes as I have
" given and devised the same by my said last will; and do here-

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“ by revoke the legacies of five hundred pounds each, which I
 “ have given to the said Sir *Hugh Smithson*, now Earl of *North-*
 “ *umberland*, and the said *Thomas Rudd*. And I do hereby revoke
 “ and make void the executorship of the said Earl of *Northumber-*
 “ *land* and *Thomas Rudd*, of my said last will and the guardian-
 “ ship of my daughter, devised to the said Earl of *Northumberland*;
 “ and do hereby confirm and appoint my said wife *Mary Bowes*,
 “ the said *Edward Gilbert*, and said sisters *Elizabeth* and *Jane*
 “ *Bowes*, executors of my will; and do also revoke and make
 “ void the trusteeship of the said Earl of *Northumberland* and
 “ *Thomas Rudd*, for the laying out of the savings of the produce
 “ of my real and personal estates in the purchasing of lands; and
 “ do hereby make and declare this codicil to be part of my last
 “ will and testament. As witness my hand and seal, this twentieth
 “ day of *October* one thousand seven hundred and fifty-eight.” Then
 followed the attestation thus: “ Signed, sealed, published, and declar-
 ed by the above-named *G. B.* as a codicil or part of his last will and
 testament, in the presence of us,” &c. The testator died without
 having made any disposition of the after-purchased estates otherwise
 than by the above-mentioned will and codicil, leaving the late Coun-
 tefs of *Strathmore*, his only child and heiress at law, him surviving.

By an order in the above causes Lord *Loughborough* C. directed
 a case to be made for the opinion of the Judges of the Court of
King's Bench upon the question, Whether the codicil of the 20th of
October 1758 was a republication of the testator's will of the 7th
 of *February* 1749 with respect to the estates purchased after the
 date of the said will? The Court of *King's Bench* having answered
 this question in the negative, (see 7 *Term Rep.* 482.) Lord *Lough-*
borough C. by his order in the above causes, in effect confirmed
 that decision. Whereupon the present Appellant submitted, that
 the said decision, and order founded thereon, were erroneous, for
 the following among other REASONS:

1st, Because it is clear from the will the testator did not mean to
 die intestate as to any part of his property, but to dispose of all his
 real estates upon the trusts therein mentioned; and it is equally
 clear, that when he made his codicil he did not mean to die in-
 testate as to any part of the estates he then had.

2d, That the will and codicil ought to have effect according to
 the intention of the Testator; that the Testator's intention, at the
 time of executing both the instruments, was to dispose of all the
 real estate which he had at the time of executing those instruments,

as well as at the time of his death. That by legal construction the will could only operate upon estates the testator had at the time the will was made; but by the same rule, the codicil could operate upon all the estates the testator had subsequent to making the will, and previous to the codicil. And that the true construction of the will and codicil is this, that by the will the Testator gave all his real estates to the trustees therein named, and by the codicil he gave all his real estates to the same trustees except two, who are thereby excluded.

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3d, That in many cases a codicil has been held to be a republication of a will, so as to pass after-purchased estates, though the testator has not expressed any particular intention to republish his will; because, according to the general understanding of mankind, a man making a general devise of all his real estates by his will is presumed to intend to dispose of all the real estates he shall have at the time of his death.

4th, That in the argument for restraining the effect of the codicil to the estates which the testator had at the time of making his will, great stress was laid upon the word "said," in that part of the codicil where the testator devises the estates to the trustees therein named; but upon the true construction of the codicil, the word "said" is of no effect, because it only makes the testator, who had recited that he had given all his estates to trustees therein named, say, that in like manner, by his codicil, he gave all his estates to the trustees whom he therein names.

5th, That if in order to pass the lands in question it should be thought necessary to consider the codicil as a republication of the will, there is sufficient in this codicil to give it that effect: the testator declares the codicil to be a part of his will; and in the attestation it is mentioned that he publishes it as part of his will. If the codicil is so to be taken, it ought to have the same effect as if the testator had in the codicil transcribed his will, excluding only two of his trustees, and then it would have been in terms a devise to the trustees whom he chose to continue of all the estates which he had at the time of executing the codicil.

J. Mansfield.

E. Law.

The respondents hoped that the opinion of the Court of *King's Bench* and the order of the Lord Chancellor founded thereon, would be confirmed and established, for the following among other

REASONS:

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1st, Because the expression contained in the codicil, bearing date the 20th day of *October* 1758, by which the testator devised his said lands, tenements, and hereditaments in the manner thereafter mentioned, manifestly confines the devise to such lands, tenements, and hereditaments as he was seised of, at the time when he published his will, bearing date the 7th day of *February* 1749, and can by no possibility of fair grammatical import be construed to extend to lands purchased after the date of the will.

2d, Because no case can be found in which an expression in a codicil so qualified, has been construed to extend to after-purchased lands. All the cases relied on by the other side plainly discover an intention to devise after-purchased estates, and contain words sufficiently comprehensive to pass them.

3d, Because, if such a construction were admitted, it would have the effect of disinheriting the heir at law, by words of doubtful, if not overstrained implication, which courts of law will never allow to be done by any thing short of an intention signified in the most express and unequivocal terms. Many reasons might exist why the testator should leave certain parts of this estate in the discretion of the heir at law. Those reasons, without doubt, influenced his mind, otherwise it is impossible to suppose that he would not in direct and explicit terms have devised the after-purchased estates, especially when it is considered how technically and particularly his will is worded.

4th, Because, upon reading the codicil, it most clearly appears that the sole purpose of the testator in making it, is to revoke the trusts contained in the will, so far as they relate to two particular trustees; for the same estates are devised upon the same trusts, and to the same trustees, with the exclusion only of those two persons, in respect of whom the devise contained in the will is expressly declared to be revoked and made void. In short, it is manifest that the testator's object in making the codicil was neither more nor less than to strike out of his will the names of *Sir Hugh Smithson* and *Thomas Rudd*, and that if those gentlemen had not been originally named as trustees and executors in the will, the codicil never would have been made.

T. Erskine.

J. Raine.

This case was argued at the bar of the House of Lords on two several days by the Attorney-General (*Law*) and *Mansfield* for the Appellants,

Appellants, and by *Erskine* and *Raine* for the Respondents. On the last day of argument (the 29th of *June*) the Lord Chancellor put the following question to the Judges, *viz.* Whether by the legal construction of the codicil of the testator *George Bowes*, bearing date the 20th of *October* 1758, and by him declared to be part of his last will and testament dated the 7th day of *February* 1749, the real estate purchased after he made his will passed to the uses and upon the trusts, intents, and purposes mentioned in the said will?

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MACDONALD Ch. B. having conferred with the rest of the Judges present (a) upon the said question, delivered their unanimous opinion in the negative.

After the Judges had thus given their opinion, a debate took place in the House, in which Lord *Thurlow* differed in opinion from the Judges. His Lordship observed that a republication of a will of lands had always been held to speak as of the time of the republication, and that he knew no instance in which that rule had been departed from, and that this case must be decided upon reference to the principles upon which former cases had proceeded; That though it was true that where there was a particular description of lands devised no subsequent codicil could extend to after-purchased lands, unless by particular reference to those lands, yet that in such case it was only the particular description of the lands which defeated the effect of the republication; That this distinction would be found to reconcile all the cases in which there was any appearance of difference; and the only question in this as in all other cases would be found to be, Whether the republication were general, or whether it were controlled by particular expressions? and that, indeed, in this very case, such seemed to have been the opinion of the Court of *King's Bench*, for in the certificate it was expressed that this codicil was not that sort of republication which would pass the lands in question; That if the testator had discovered any anxiety in the will, it was to convey all the estates of which he was possessed; That the bequest in the will was as ample as possible; That the testator began the codicil by referring to the largeness of the former devise, where he said, "whereas by my last will and testament I have given and devised *all* my freehold and copyhold," &c.; That this reference, unrestrained by any thing, would clearly have been sufficient to pass the after-purchased lands,

(a) *Motham* B. *Haith* J. *Thompson* B. *Reake* J. *Le Blanc* J. and *Graham* B.

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and that probably the whole difficulty had arisen from the testator being mistaken in point of law, and thinking that his after-purchased lands did pass by the first devise; That his general intent appeared to have been, that the rents and profits of all his estates should be laid out in the purchase of new lands, and yet the House must negative this general intent before they could decide in favour of the respondents; That it appeared to him that the testator must be understood to say, whereas I have conveyed all my lands (including those purchased subsequent to the date of the will), I devise my *said* lands, referring to what he supposed he had conveyed; and that in this view of the case the introduction of the word "said" would not control the operation of the codicil.

The LORD CHANCELLOR (Lord *Eldon*) supported the opinion of the Judges, saying, that although a republication of a will of lands certainly speaks as of the time of the republication, yet that in all cases of this kind which had come before the Courts for decision, the only question had been, whether the particular case was or was not within the general rule. His Lordship observed that it could not be denied that other circumstances than those of locality in the description of the lands devised, were sufficient to control the effect and operation of a codicil, and that wherever a question had arisen whether the operation of the codicil were controlled or not, those who had to solve the question had usually done so by satisfying themselves respecting the intent of the testator; That this testator's intention in the will clearly was to raise a fund to be applied to certain uses, but that possibly the undivided quality of the estate which he purchased in 1754 might be a reason inducing him not to pass that estate with the others; That however possible it might be that the testator might not be acquainted with the legal effect of his will, still he thought that the House ought to decide this question as if the testator actually did know that the will of 1749 had not passed the after-purchased lands; That when in the codicil he referred to the will as having passed all his lands, he did no more than recite his former devise, but that when he came to the operative part of the codicil he changed the tense of the verb; and though in the former part he said, "whereas I have devised," &c. in the latter part he said, "I do hereby revoke," &c. and "I do hereby give and devise," &c.; That if therefore by the former words of the codicil, "all my freehold and copyhold lands," the testator were understood to include all the after-purchased lands

lands, by the latter words of the Codicil he must be understood to be revoking a devise of these lands which he had not at the time when the will was made; for his expressions of revocation were co-extensive with the expressions of devise; That these expressions therefore, unless explained by the context, would be unintelligible; but that the word "said" clearly shewed that they were both intended to be confined to the lands which the testator possessed at the time of the will, and that this construction rendered them consistent; That the intent of the testator (if it could be discovered) was the clue by which the House ought to direct itself; and though in the present case that intent could not be positively ascertained, yet that some cases might be put to illustrate the danger of the doctrine contended for on the part of the respondents; for supposing the testator at the time of making his will to have been possessed of lands to the amount of 100*l. per ann.* only, and between that time and the time of making the codicil to have purchased lands to the amount of 10,000*l. per ann.* it would seem impossible to contend that by a mere reference to a devise of so small a part of the property he intended to pass so considerable an estate; That the true question seemed to be, whether from the words "my said lands" a special intention to exclude the after-purchased estate did not appear, in the same way as it would have appeared, had he referred to the lands originally devised by a description of locality; but that, indeed, if their Lordships were not satisfied that such a special intention did appear, the general rule respecting the operation of a republication must operate in favour of the Appellants.

The Earl of ROSSLYN (late Lord *Loughborough* Chancellor) and Lord ALVANLEY, Chief Justice of the Common Pleas, also spoke shortly in support of the opinion of the Judges.

The LORD CHANCELLOR then moved that the appeal might be dismissed and the order therein complained of be affirmed; which motion passed in the affirmative without a division.

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The KING v JOHN EGGINTON, WALTER EGGINTON,
THOMAS GIBBONS, JOHN FOULDS, and WM. FOULDS.

Indictment for a burglary laid in the 1st count to have been committed in the house of *M. R. B.*; in the 2d of *J. B.*, and in the 3d of *W. N.* It appeared that the place where the robbery was committed was a centre building, having two wings; that in the centre building the business of *M. R. B.*, *J. B.*, *R. N.* and several other persons was carried on; that in part of one of the wings was the dwelling of *M. R. B.* and in the other part that of *J. B.* neither having any internal communication with the centre except by a window in the dwelling of *J. B.* which looked into a passage that ran the whole length of the centre; and that the other wing was occupied by *W. N.*, from which there was no communication with the centre. *Semb.* that the robbery did not amount to a burglary.

THE four first Defendants were tried before *Lawrence J.* at the Spring Assizes for *Stafford* 1801, for a burglary. The 1st count in the indictment charged them with breaking and entering the dwelling-house of *Mathew Robinson Boulton*, and stealing therein a quantity of silver and 150 guineas, laid to be the property of *Mathew Boulton* and *John Hodges*, 150 guineas laid to be the property of *Mathew Boulton*, *Mathew Robinson Boulton*, *James Watt*, and *Gregory Watt*; 150 guineas the property of *Mathew Boulton*, *John Bonus*, and *William Nelson*; 150 guineas the property of *Mathew Boulton*, *Benjamin Smith*, and *James Smith*; and 150 guineas the property of *Mathew Boulton*, *John Hodges*, *Mathew Robinson Boulton*, *James Watt*, *Gregory Watt*, *John Bonus*, *William Nelson*, *Benjamin Smith*, and *James Smith*. The 2d count laid the house to be the dwelling-house of *John Busb*. The 3d count laid the house to be the dwelling-house of *William Nelson*. The 4th count was for being in the dwelling-house of said *Mathew Robinson Boulton*, and stealing as above, and burglariously breaking the house to get out of it against the statute, &c. The 5th count for being in the dwelling-house of *John Busb* stealing the property, and burglariously breaking the house to get out of it against the statute, &c. The 6th count for stealing the property as above in an outhouse belonging to the dwelling-house of said *Mathew Boulton* against the statute, &c. The 7th count for stealing the property as above in an outhouse belonging to the dwelling-house of said *Mathew Robinson Boulton* against the statute, &c. The 8th count for stealing the property as above in an outhouse belonging to the dwelling-house of *William Nelson* against the statute, &c.

On the trial it appeared that the silver goods were the property of *Mathew Boulton* and *John Hodges*, the money the property of the several persons last mentioned in the indictment, with whom

If a servant, being solicited to become an accomplice in robbing his master's house, inform his master thereof, who thereupon tells him to carry on the business, and consents to his opening a door leading to the premises, and being with the robbers during the robbery; and also marks his property and lays it in a place where the robbers are expected to come, with a view to apprehend the robbers, this conduct of the master will not amount to a defence in an indictment against the robbers.

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Mathew Boulton was concerned in different manufactories, that is to say, with *John Hodges* as manufacturers of plated goods; with *William Nelson* and *John Bonus*, as button makers; with *James Smith* and *Benjamin Smith* as buckle makers; with *Mathew Robinson Boulton*, *James Watt*, and *Gregory Watt*, as engine makers. Besides which *Mathew Boulton* carried on two other manufactories on his own sole account. It farther appeared that the money and part of the silver were kept in a counting-house, which was used for transacting the money concerns and keeping the accounts of all the different businesses in which *Mathew Boulton* was engaged; that other part of the silver was in a room, being one of several where the plate business was carried on, which rooms and counting-house formed a centre, having two wings adjoining, consisting of a dwelling-house, inhabited by persons engaged in *Mathew Boulton's* manufactories; that one of them was inhabited by *Mathew Robinson Boulton*, but that had no internal communication with the centre-building at the time of the offence being committed, a room in his house which communicated with the centre-building having been allotted to the purposes of the plating business with which he had nothing to do, the door into it was shut up, and a working bench placed against it so as to stop the passage; that one *Bush* a workman of *Mathew Boulton* occupied another of the dwelling-houses in the same wing, and from his house there was no way into the centre-building, but there was in it a window which looked into a passage that ran the whole length of the centre-building; that in the other wing was the dwelling-house of *William Nelson*, the partner of *Mathew Boulton*, in the button business, which had no internal communication with the centre, and in that wing other persons lived; that in the front of this building was a terrace or front yard fenced round in different ways, and at the end of the pile of building above described by a wall with gates for horses and carriages, and a door for foot passengers. It further appeared that the prisoners had some time previous to the breaking into the centre-building applied to one *Joseph Phillips*, who was employed as a watchman to the manufactory at *Soho*, to assist them in robbing it, to which he assented, and informed first some of *Mathew Boulton's* servants and assistants, and afterwards *Mathew Boulton* himself of what was intended, of the manner and time they were to come, that they were to go into the counting-house, and that he was to open the door into the front-yard to the prisoners; that *Mathew*

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Boulton told him to carry on the business; that *Mathew Boulton* was to bear him harmless, and that *Mathew Boulton* consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time; that in consequence of this information *Mathew Boulton* removed from the counting-house every thing but 150 guineas and some silver ingots, which he marked to furnish evidence against the prisoners, and lay in wait to take them when they should have accomplished their purpose; that on the 23d of *December*, about one o'clock in the morning, the prisoners came, and *Phillips* opened the door into the front yard, through which they went along the front of the building, and round it into another yard behind it, called the middle-yard; and from thence they and *Phillips* went through a door, which was left open, up a stair-case in the centre-building leading to the counting-house and rooms where the plate-business was carried on; that this door the prisoners bolted, and then broke open the counting-house which was locked, and the desks which were also locked, and took from thence the ingots of silver and guineas; that they then went to the storey above, into a room where the plate-business was carried on, and broke the door open, and took from thence a quantity of silver and returned down stairs, when *William Foulds* unbolted the door at the bottom of the stairs, which had been bolted on their going in, and went into the middle-yard, when all except *William Foulds* (who escaped) were taken by the persons placed to watch them.

On this case two points were made for the prisoners; 1st, that no felony was proved, as the whole was done with the knowledge and consent of *Mathew Boulton*, and that the acts of *Phillips* were his acts. 2dly, That if the facts proved amounted to a felony, it was but simple larceny, as the building broken into was not the dwelling-house of any of the persons whose house it was charged to be, and as there was no breaking since the door was left open.

The jury found the prisoners guilty, but *Lawrence J.* reserved the above points for the consideration of the Judges, before eleven of whom (*absente* Lord *Eldon*, then Lord Chancellor as well as Lord Chief Justice of the Common Pleas), it was argued on the 9th of *May* last.

Clifford for the prisoners began by arguing the second objection. The place in which the offence was committed was so completely separated from the dwelling-house as not to be the subject of burglary. The case of the *King v. Gibson, Mutton, and Wiggs*,

1 *Leach*, 396. *Ed.* 1800. which is the strongest authority in support of the proposition that this offence is a burglary, is very distinguishable from the present. There the person in whom the property of the house was laid was the sole occupier of the house to which the shop in which the offence was committed was attached, though he had leased part of his house with the shop to another person. But here though *M. R. Boulton* was the sole occupier of the adjoining house in the wing of the building, yet the centre-part where the offence was committed was separated from the wing, and neither belonged to nor was in the sole occupation of *M. R. Boulton*; but was in the joint occupation of the several partners in the business. It appears from 1 *Il. P. C.* 557. that a separation of a shop from the mansion-house by lease is a sufficient separation in law to prevent the former from being the subject of burglary. Indeed in the *King v. Martha Jones*, 2 *Leach*, 607. *Ed.* 1800, where the rent of a house was paid from the partnership fund of *A.* and *B.*, the property so as to constitute burglary was held to be ill laid in both, the house being in the single occupation of *B.* Clearly in an ejectment brought for these premises the demise would not have been well laid in *M. R. Boulton*, and if so the property is not well laid to support the offence of burglary. With respect to the 1st objection, the consent of the prosecutor removes all criminality from the prisoners. In almost every species of offence committed against the property of another it is of the essence of the offence that it should be committed against the will of the owner. *Bracton*, lib. 3. tr. 2. c. 32. §. 150. b. defines theft thus, *contractatio rei alienæ fraudulenta cum animo furandi invito illo Domino cujus res illa fuerit*: and Lord Ch. J. *Willes*, in the *King v. Donally*, 1 *Leach*, 232. *Ed.* 1800, seems to take it for granted that robbery must be against the will of the owner, when he says, "Wherever one man obtains property from the possession of another against his will, the law presumes the act to proceed from a felonious intention." The prosecutor's assent to the commission of the crime, would undoubtedly have made him an accessory before the fact, had it not been an assent to the stealing of his own property. In the *King v. M^r Daniel*, *Fost.* 125. it is laid down as incontrovertible, "that whoever procureth a felony to be done is a felon; if present he is a principal; if absent an accessory before the fact;" and the statutes, 4 and 5 *Pb.* and *M. c.* 4. and 3 and 4 *W.* and *M. c.* 9. are referred to; which, in describing the offence,

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speak of persons who "maliciously counsel, hire, command, comfort, aid, abet, or assist." Sir *Edward Coke* in his commentary on the statute of *Westm. 1. c. 14. 2 Inst. 182.* says, that under the word "aid" is comprehended all persons "assenting and consenting" to the act. Now in this case the prosecutor did assent and consent, and if his crime be done away by the circumstance of the property, to the stealing of which he assented, being his own, the same circumstance does away the crime of the prisoners also; for if this was a felony, the prosecutor is criminal as an accessory, and he can only shew himself not criminal as such by shewing that the prisoners committed no felony. Suppose *Phillips* the watchman had been indicted for the burglary, what could have prevented his being convicted of the crime but the assent of the prosecutor? Now that assent extends to all the persons concerned, and will operate to save the prisoners in the same way as it would have operated in his favour. To shew that without such assent *Phillips* must have been convicted, *Joshua Cornwell's case*, 10 *Harg. St. Tr.* 433. in the notes, may be referred to, where the opening the door of his master's house by the prisoner in the night-time, and letting in two persons to rob him, was adjudged by the twelve Judges to be burglary. In the *King v. M^{daniel}*, all the prisoners were acquitted on account of the robbery having been committed in consequence of a previous agreement, and it is there said to be "of the essence of robbery and larceny that the goods be taken against the will of the owner." The only case in which the assent of the party robbed has been held not to take away the felony is that of *Norden*, cited in the judgment in the *King v. M^{daniel}*, *Fost.* 120; but the answer to that case is there given, *viz.* that it was uncertain whether the robber would come or not, the officer having no concert with the highwayman, but only going upon the road in expectation of being robbed, and submitting to the robbery. In this case there was a regular plan for the robbery of the prosecutor's premises carried on through the intervention of the accomplice with the prosecutor himself.

Manley on the part of the prosecution. 1st, With respect to the burglary, it is not necessary that a communication should exist between the part broken into and the rest of the house; it is sufficient if the former be parcel of the latter and under the same roof; this point seems clearly established by the case of the *King v. Gibson, Mutton, and Wiggs*. Nor is it any objection that the place

place where the offence was committed was used in the business of several other persons jointly with *M. R. Boulton*, for being under the same roof with his dwelling-house it may well be considered as parcel of that house. If one of the partners in a banking-house occupy the dwelling-house to which the shop belongs, and the shop be broken into, there can be little doubt that it would amount to a burglary in the dwelling-house of the partner residing there. The case of the *King v. Martha Jones* is distinguishable from the present, it being expressly stated there that the two houses were perfectly distinct and separate from each other at the time the offence was committed. 2dly, It has been argued, that if the offence of the prisoners amount to a felony the prosecutor has made himself an accessory to that felony by his conduct, and that if he be not an accessory it must be because no felony was committed. But the essence of the felony consists in the felonious intent. Thus *Bracton* in the place cited on the other side, after saying that theft must be committed *cum animo furandi*, adds, *cum animo dico, quia sine animo furandi non committitur*. The prosecutor therefore was not *particeps criminis*, inasmuch as his consent was only given for the purpose of promoting the detection of the prisoners. The present resembles *Nordon's* case, who went out with a view to be robbed in order that he might apprehend the robber. But in neither case was there any concert between the party committing the offence and the party on whom it was committed. Such also was the case of the man tried some little time back at *Worcester Assizes*, who being suspected of robbing in an inn there, a great coat was placed in his way with a pocket handkerchief hanging out of the pocket, and the man being watched and detected in stealing the handkerchief, was convicted before Mr. Baron *Thompson*, who overruled the objection that he was induced to commit the offence by the persons who placed the great-coat in his way. There is also a case in *Fitzberbert's Justice of the Peace*, by *Crompton*, Ed. 1617. p. 31. b. which is precisely in point. There the servant of an Alderman of *London* agreed with strangers to steal the plate of his master on a certain night in his house, and they had a false key of the place where the plate was kept; afterwards the servant revealed the design to his master, who on the appointed night had certain men ready at the place, *et apres ils vient et enter in le dit lieu*, with intent to steal the plate, and were taken and arraigned for burglary at *Newgate*, found guilty and hanged.

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The opinion of the Judges was never publicly communicated, though it was understood to be in favour of the prisoners on the question of burglary. The other objection taken by their counsel was overruled, as appeared from the prisoners receiving a pardon on condition of transportation beyond seas. Indeed *William Foulds*, who had been included in the indictment found against his associates, having been taken between the Spring and Summer Assizes, was tried before Mr. Justice *Lawrence* at *Stafford* at the latter period, and being found guilty of the larceny received a similar punishment with the other prisoners.

THE END OF TRINITY TERM.

C A S E S

ARGUED and DETERMINED

1801.

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Forty-second Year of the Reign of GEORGE III.

FAWCETT v. CHRISTIE and Another.

Nov. 6th.

THE Defendant in this case was arrested in *August* last upon a *capias* returnable on the morrow of All Souls (3d of *November*); on the 2d of *November* he took out a summons and served it on the Plaintiff to stay proceedings on payment of the debt and costs; on the 3d, being the *essoign* day of the term, the Plaintiff filed a declaration *de bene esse*; on the 4th, the Defendant obtained an order to stay proceedings, and served the Plaintiff with an appointment to attend the taxation of costs upon the following day. On this last day (the 5th) the costs were taxed by the prothonotary, who allowed the costs of the declaration,

Defendant having been arrested on a *capias* returnable on the first return of the term, on the day before the *essoign* day took out a summons to stay proceedings upon payment of the debt and costs; on the *essoign* day Plaintiff filed a declaration *de bene esse*, and on the

Best Serjt. now moved that the prothonotary might be directed to review his taxation, contending that the Plaintiff was not entitled

day after the *essoign* day, Defendant obtained an order to stay proceedings. Held that the Plaintiff was entitled to the costs of the declaration.

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led to the costs of a declaration filed after a summons to stay proceedings on payment of the debt and costs, the summons being served before the return of the writ. He cited *Golding v. Grace*, 2 Bl. 749. as in point; where the Court held, that, though a declaration may be delivered *de bene esse* on the return day, and shall be good for many purposes, yet being in favour of the Plaintiff to expedite his cause, it cannot be delivered so as to charge the Defendant with paying for the declaration till the appearance day (a).

But *The Court* were of opinion that the Plaintiff was entitled to the costs of his declaration, saying that the summons was no stay of proceedings, and that he had therefore a right to proceed until an order was made; that if it were otherwise the Defendant might make use of a summons for the mere purpose of gaining time; that he might lie by, as in the present case, till the eve of the effoign day, take out a summons to prevent the Plaintiff's declaring, and then abandon the summons.

Jest took nothing by his motion.

(a) The Court there observed, that if it were otherwise, "an attorney might delay the service of the writ till the night before the return, and charge the Defendant with the costs of the declaration as well as of the process." And it is said, that "in the

King's Bench the master will not allow the costs of declaration delivered under such unfair circumstances," 1 *Sall. Pr.* 227. Ed. 2. But no authority of that Court is cited in support of this practice.

Nov. 9th.

CLEMPSON v. KNOX.

If bail be put in with the filazer of the county in which the Defendant is arrested on a *testatum capias*, the bail may be treated as a nullity, and an attachment issue. But if the Plaintiff

THE Plaintiff in this case having sued out a *capias* into *Middlesex*, upon which *non est inventus* was returned, afterwards sued out a *testatum capias* into *Staffordshire*, in which last county the Defendant was arrested, and put in bail with the filazer for that county; this bail the Plaintiff treated as a nullity, and issued an attachment against the Sheriff of *Staffordshire*.

A rule *nisi* having been obtained for setting aside this attachment and all proceedings thereon,

appear to have been aware that bail were actually put in, though with the wrong filazer, the Court will relieve against the attachment.

Bayley Serjt. now supported (a) the rule, and contended that the bail was regularly put in with the filazer for *Staffordshire*, for that the rule of this Court, *Hil. T. 1782*, which allowed the Plaintiff to arrest the Defendant in the county where he is to be found, and afterwards to declare against him in a different county without waving the bail, had taken away the writ of *testatum capias*, *Imp. Pr. C. B. 166. Ed. 4.* and that the writ upon which the Defendant was actually arrested and put in bail was to be considered in the nature of an original *capias*.

Best Serjt. *contra*, insisted that the rule of this Court, *Hil. T. 1781, Imp. Pr. C. B. 159, Ed. 4.* had removed the only difficulty in cases of this kind, by obliging the Sheriffs to specify on their warrants for the *testatum capias* from what county the original *capias* issued, so that a Defendant can now be under no difficulty in ascertaining the county where bail are to be put in; and that the rule of *Hil. T. 1782* did not apply to this case, for though the Plaintiff by that rule be allowed to sue out an original *capias* into a different county from that in which he means to declare, yet if he first sue out an original *capias* and follow it up by a *testatum capias*, the bail must be put in as if that rule had not been made. He cited *Harris v. Calvert*, 1 *East*. 603. where a *capias* having issued into *London*, and the Defendant afterwards having been arrested on an *alias capias* in *Middlesex*, and bail having been put in in the latter county, the Court of *King's Bench* set aside the proceedings upon a *scire facias* against the bail, saying it was the same as if no bail had been put in, and the Plaintiff might have proceeded against the Sheriff for that default. He also observed that the objection was stronger in the *Common Pleas* than in the *King's Bench*, because in the latter there is but one filazer for all *England*, whereas in the former there are different filazers for the different counties.

Bayley observed, that *Harris v. Calvert* did not apply, because no rule existed in the *King's Bench* similar to that in the *Common Pleas* of *Hil. T. 1782*.

The Court thought the attachment regular, observing however that they did not proceed upon the authority of the case in the

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(a) Previous to showing cause a preliminary objection was taken to the affidavits on which the rule was founded, viz. that it was intitled in the cause, whereas it ought to have been intitled the *King v. The Sheriff of Staffordshire*. The Court held the objection well founded; but it was afterwards waved.

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King's Bench, but upon the practice of this Court, and adding that the comment in *Inspey's Practice*, which lays down that the rule of *Hil. T.* 1782 has taken away the *testatum capias*, is rather inaccurate. But it appearing that the Plaintiff at the time when he proceeded was aware of the bail having been actually put in with the filazer for *Staffordshire*, they made the rule absolute for setting aside the proceedings, leaving the attachment to stand as a security.

(In the EXCHEQUER CHAMBER.)

Nov. 13th.

G. BROWN, H. BROWN, and J. P. RICHARD v.
 KEWLEY and Another; in Error.

Assumpsit for goods sold and delivered. Plaintiff proved that having sold goods to the Defendant, he received from him a check upon a J. S. a banker, directing the latter two months after date to pay to the Plaintiff a bill at two months, for the amount of the goods, which check was indorsed by the Plaintiff,

and paid by him into the banking-house of J. S. who entered it short in the Plaintiff's account; that the Plaintiff and Defendant both kept accounts with J. S., and that the general course of business between J. S. and most of his customers was to settle accounts on certain quarterly days; when he advanced bills for his customers, or received bills from them, he entered the whole amount in his books as bills; but on the quarterly days he debited his customers with the whole amount of bills advanced to or for them, crediting them at the same time for interest from such day to the day when the bills would become due, and credited his customers for the whole amount of bills paid in by them, debiting them for the interest in like manner, and when a check was paid in for a bill to be drawn at a future day, he calculated and allowed interest, on the next quarterly day, to the time when such bill, if drawn, would become payable; that the account of the Plaintiff and J. S. had been settled only six times, between May 1798 and March 1793, but that each of those settlements took place on a quarterly day; that on the 18th of March 1793, J. S. became bankrupt, a quarterly day having intervened between the payment of the check into the house of J. S. and his bankruptcy, upon which last quarterly day no settlement of accounts between Plaintiff and J. S. took place, nor was the amount of the check ever carried out as cash, or any calculation of interest made thereon till after the bankruptcy; that when the check was paid into the banking-house of J. S. there was a balance of £51 l. 11 s. in favour of the Plaintiff, which was much overdrawn before the bankruptcy of J. S. without any other addition to the credit side of the Plaintiff's account than the check in question. The Defendant offered to prove, that on the last mentioned quarterly day the account between himself and J. S. was settled, at which time he was debited for the whole amount of the check, and credited for interest thereon from the day of settlement to the day when the bill mentioned in the check, if drawn, would have become due. Held 1st, that the check in question did not, under all the circumstances of the case, amount to a payment for the goods by the Defendant; 2dly, that the evidence offered by Defendant was not admissible.

H. Brown on the joint account of themselves and *J. P. Richard*, also a merchant at *Liverpool*; that on the 7th of *February* 1793, *G. and H. Brown*, on behalf of themselves and *J. P. Richard*, delivered to *Kewley and Co.* the following check on *Caldwell and Co.* bankers at *Liverpool*:

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"Messrs. *Caldwell and Co.* *Liverpool*, 7th *February* 1793.

"Two months after date pay Messrs. *J. and P. Kewley* a bill at two months for one thousand one hundred and sixty-one pounds seventeen shillings and ten pence, charging one half to account of Messrs. *Richard and Co.*

£. 1761 17s. 10d.

G. Brown and H. Brown."

That *G. and H. Brown* on their partnership account, and *J. P. Richard* on his own account, and *Kewley and Co.* on their partnership account, respectively dealt with *Caldwell and Co.* as bankers, and in the remitting and negotiating of money and bills of exchange; that on the 19th of *February* 1793 the above check, was indorsed by *Kewley and Co.* and paid by them to *Caldwell and Co.* to be placed to their account, and was accordingly entered short by *Caldwell and Co.* in their account with *Kewley and Co.* and also in the duplicate account kept by *Kewley and Co.*; that on the 18th of *March* 1793, *Caldwell and Co.* became bankrupts; that before the bankruptcy of *Caldwell and Co.* the general usage and course of dealing between them and most of their customers was to settle their accounts quarterly, viz. on the 28th of *February*, the 31st of *May*, the 31st of *August*, and the 30th of *November*. 'When *Caldwell and Co.* advanced bills for their customers, or received bills from them, they always entered the whole amount of such bills in their banking books as bills, but on the settlement of accounts they drew out an interest account, and made such persons debtors for the interest of all bills paid by the said *Caldwell and Co.* to or for such persons from the time when such bills became due until the next day of settlement, and on the contrary they gave such persons credit for the interest of bills which they had paid into the said bank from the times when such bills respectively became due until the day on which such settlement took place (a), and the ba-

(a) It is manifest that some error must have crept into this part of the bill of exchange. From the nature of the bill, as well as from the whole course of the argument, the usage appears to have been this, viz. To debit the customer on each quarterly day for the whole amount of the bills advanced to or for them, and at the same time to credit them for the interest on such bills from such quarterly day to the day when they would respectively become due; and on the other hand, to credit the customer on the quarterly day with the whole amount of bills paid in by them, and to debit them with the interest from such day to the day when the bills would respectively become due.

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lance of such interest account was on such settlement charged to the debit or credit of the persons with whom the said *Caldwell* and Co. kept accounts, according to the state of such interest account, and on such settlement the interest to debit or credit made a component part of the principal sum which was carried on as a fresh balance; and so they from time to time carried on such account. The interest when to the debit of the customer was entered at the time of settlement thus—"Interest to debit deducted £. —;" and the amount was deducted from the credit side of the account: the interest when to the credit of the customer was entered thus—"Interest to credit £. —;" and the amount was added to the credit side of the account. And when any checks or orders were given for bills, which bills were to be drawn at a future period after the date of the check or order, and such check or order was paid into the bank, the interest was at the next day of settlement in like manner calculated and allowed from the time when such bill, if it had been drawn, would by the tenor of the check or order have become payable; that *Kewley* and Co. began to deal with *Caldwell* and Co. on the 1st May 1788, and the accounts between them were settled at the respective times following, viz. on the 31st of August 1788, the 30th November 1789, the 28th February 1790, the 31st of August 1790, the 28th February 1791, and the 31st May 1792; that when the said check was paid in by *Kewley* and Co. and entered in the book of *Caldwell* and Co. the whole account from the last-mentioned settling day on the credit side in favour of *Kewley* and Co. was as follows, viz.

By balance 31st May 1792	-	-	322	0	11
Oct. 13. <i>Greaves</i> and Co.—16. Dec.	-	-	123	11	9
Feb. 9. order <i>G. B. and H. and R. M.</i>					
and Co.—10. June	-	-	1761	17	10

445 12 8

That the letters "*G. B. and H.*" expressed that *G. and H. Brown* were the drawers of the check, and the letters "*R. M. and Co.*" that half the amount of the check was to be placed to the account of *J. and P. Richard*, and that "*10. June*" expressed the time when the bill required by the check was to become due; that after this entry, but before the bankruptcy, the sums in the cash column of the above account were added up by one of the partners in the bank, which amounted to 445*l.* 12*s.* 8*d.* without including the

1761*l.*

1761*l.* 17*s.* 10*d.*; which still remained entered short, and so remained at the time of the bankruptcy; that after the bankruptcy one of the clerks carried out the said 1761*l.* 17*s.* 10*d.* into the cash column, and erased the sum 445*l.* 12*s.* 8*d.* instead of which he inserted the whole amount of the sums contained on the credit side of the said account, including the said sum of 1761*l.* 17*s.* 10*d.*; that no calculation of interest on the said 1761*l.* 17*s.* 10*d.* was ever made or inserted in the book containing the account of interest between *Kewley* and Co. and *Caldwell* and Co. before the bankruptcy of the latter, the clerk who usually transacted that part of the business having been forbidden to insert such charge by one of the partners in the house of *Caldwell* and Co. till he should have seen one of the partners in the house of *Kewley* and Co.; but in the books of *Caldwell* and Co. when produced, the whole account of *Kewley* and Co. appeared to have been balanced, and interest to have been charged on the bill for 1761*l.* 17*s.* 10*d.* which balance was settled by one of the clerks in the house after the bankruptcy; that at the time when *Kewley* and Co. paid in the bill for 1761*l.* 17*s.* 10*d.* to the banking-house of *Caldwell* and Co., the balance of accounts in their favour amounted to no more than 51*l.* 11*s.*, but after that payment, and before the bankruptcy of *Caldwell* and Co. they received from *Caldwell* and Co. (without any fresh advance on their part), in cash and bills which were afterwards paid 294*l.* 3*s.* 5*d.*, and several other bills to the amount of 856*l.* 12*s.* 11*d.* which were not paid in consequence of the bankruptcy of *Caldwell* and Co., but returned and taken up by *Kewley* and Co., and that no bill was ever paid or required to be paid by *Caldwell* and Co. for the amount of the check of the 7th *February*.

On the other hand *Brown* and Co. in order to prove that the check given by them to *Kewley* and Co. was paid to and received by *Caldwell* and Co. upon the terms and in the usual course of business above mentioned, notwithstanding the interest on the 1761*l.* 17*s.* 10*d.* was not entered in the account of *Kewley* and Co. to their debit till after the bankruptcy, offered evidence that in the respective accounts between *Caldwell* and Co. and G. and H. *Brown*, and *Caldwell* and Co. and J. P. *Richard*, one moiety of the amount of the check in question was entered to the debit of G. and H. *Brown*, and the other moiety to the debit of J. P. *Richard*; that on the 28th of *February* 1793, which was the next settling day after the delivery of the check by *Kewley* and Co. to

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Caldwell and Co., G. and *H. Brown* and *J. P. Richard* were according to the usage above-mentioned credited in their respective accounts with the interest of their respective moieties from the last mentioned settling day for so many days as the bill required by the check to be paid would have to run before it would become due.

This evidence being objected to by the counsel for *Kewley* and Co. as inadmissible, was rejected by the learned Judge: upon which the counsel for *Brown* and Co. insisted that the delivery of the check to *Kewley* and Co. and their receipt of the same in payment of the goods, and the indorsement over of the check to *Caldwell* and Co. operated as a legal payment and satisfaction for the goods, but the learned Judge directed the jury that it was not a legal payment or satisfaction, and that the evidence given on the part of *Kewley* and Co. if believed, entitled them to a verdict. Whereupon a bill of exceptions was tendered, and afterwards sealed by the learned Judge.

The assignment of errors proceeded upon the rejection of the evidence tendered on the part of *Brown* and Co., and the direction given to the jury.

Giles for the Plaintiffs in error on a former day argued, 1st, That if the books of *Caldwell* and Co. were admissible in evidence on the part of *Kewley* and Co. to shew how the account stood between them and *Caldwell* and Co., they were admissible also on the part of the *Browns*, to shew how their account stood with *Caldwell* and Co., for that the act of the bankers, if available against one party, was available also against the other: 2dly, that the whole difficulty of the case had arisen from the neglect of *Kewley* and Co. to settle their account upon the 28th of *February*, for had they so done they would then have been credited for the whole amount of the check minus the interest from that time to the 10th of *June*, which would clearly have been a satisfaction for the goods; that although *Kewley* and Co. had not regularly settled their account on all the quarterly days from the time of their beginning business with *Caldwell* and Co. yet it appeared from the evidence that the days on which they had settled their accounts were all quarterly days, and therefore they must be considered as being within the usage; that if such was the case, *Kewley* and Co. must be treated as if they had actually settled their accounts on the 28th of *February*; that although no balance was actually struck, yet that *Kewley* and Co. had obtained credit and derived advantage from

from the check having been paid in to *Caldwell* and Co. for that they had drawn beyond the amount of their account as it stood when the check was paid in, without having increased their credit by any additional bills or cash.

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Lambe for the Defendants in error contended, 1st, That the manner in which *Caldwell* and Co. kept their accounts with *Brown* and Co. could not control a contract made between the latter and *Kewley* and Co., it being a general principle that whatever passes between two persons cannot bind a third who is no party to the transaction; 2dly, that it did not appear that *Kewley* and Co. ever acceded to the usage stated in the bill of exceptions, only six settlements of account between them and *Caldwell* and Co. having taken place from *May* 1788 to the period of the bankruptcy; that in fact the usage was only stated to extend to most of the customers, and that *Kewley* and Co. therefore were not under the necessity of negating their having acceded to the usage; that no bill was in fact demandable till the 7th of *April*, before which time *Caldwell* and Co. had become bankrupts, and were unable to give any bill, and therefore it resembled the case of a bill dishonoured, which is no payment; that at any rate the check being entered short up to the time of the bankruptcy, proved decisively that it was never considered as cash in the account between *Caldwell* and Co. and *Kewley* and Co., for that according to the case of *Zinck v. Walker*, 2 Bl. 1154. it was a mere deposit, and the property remained unaltered; and that it did not appear that the money advanced to *Kewley* and Co. was on the faith of the check in question, but might have been advanced on the general confidence subsisting between the two parties.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. (who after stating the principal facts of the case, proceeded thus). It would have been very material in this case for *Brown* and Co. to have shewn that a settlement had actually taken place between *Kewley* and Co. and *Caldwell* and Co. after the bill was paid in, and previous to the bankruptcy of the latter, whereby that which was in its inception merely a bill transaction, would have been converted by the act of both parties into a money transaction. It happens however that the contrary fact has been established, viz. that the last settlement between *Kewley* and Co. and *Caldwell* and Co. took place on the 31st of

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May 1792, a period of nearly a year antecedent to the time at which the bill of *Brown and Co.* was paid into the banking-house. Now it is most clear that *Kewley and Co.* cannot be bound by any settlement of accounts between themselves and *Caldwell and Co.*, to which they did not agree. Indeed in this case the bill in question continued in that column of the account where bills are entered short until after the bankruptcy of *Caldwell and Co.*, after which period any alteration in the account would of course be perfectly ineffectual. Up to that time therefore it stood as a running bill, and was never accepted by *Kewley and Co.* as payment of their debt from *Brown and Co.*, nor to their knowledge ever considered by any one else as payment of that debt. It is stated indeed, that after the bill had been paid into the banking-house, *Kewley and Co.* overdraw their account as it stood before it was paid in, and were accommodated by *Caldwell and Co.* with bills instead of money, which bills on the failure of the latter were not paid. But this accommodation does not by any means appear to have proceeded on the ground of the bill in question being paid in, but the only inference to be collected from that circumstance is, that these bankers who were in the habit of accommodating their customers to a considerable extent, permitted *Kewley and Co.* to overdraw their account. Nor indeed if that permission resulted from the circumstance of the bill being paid in, would it constitute a payment between *Kewley and Co.* and *Brown and Co.* for the goods sold by the former to the latter. The 1st question to be considered is, whether this transaction can be deemed a payment accepted by *Kewley and Co.*, and in considering that point it will be necessary to inquire, whether *Kewley and Co.* could have maintained an action against *Caldwell and Co.* for the amount of the bill? Now I think it very clear that no such action could have been sustained, for till *Caldwell and Co.* actually credited *Kewley and Co.* in their books for the amount of the bill as money received by them, there would exist no evidence to charge them with such a demand; and indeed it is admitted on all sides that while the bill remained entered short, nothing but an assent of the respective parties could bind either to accept the bill as a payment of money. If therefore *Caldwell and Co.* were not liable to any demand from *Kewley and Co.* for the amount of the bill, it will be impossible to work up this transaction into a payment as between *Kewley and Co.* and *Brown and Co.* The next question that

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that arises is, whether the evidence rejected by the learned Judge was properly rejected? That perhaps is the most doubtful question of the two. Clearly, if when admitted, the evidence would have proved nothing, it was not admissible. It was asked, why should not this sort of evidence be admitted on the part of *Brown* and Co. in the same manner as it was admitted on the part of *Kewley* and Co.? For this plain reason, that the evidence admitted on the part of *Kewley* and Co. was an essential part of the transaction, and arose as much out of the case on one side as the other. It does not therefore follow that evidence of the same sort not introduced by the same necessity was admissible. *Kewley* and Co. were bound to shew what had become of the bill given to them by *Brown* and Co. for the goods. It is true that a day of settlement between *Brown* and Co. and *Caldwell* and Co. had arrived, and that the former had agreed to be accounted debtors to the latter for the amount of the bill. But *Kewley* and Co. were not informed that they had acquired this new credit in the books of *Caldwell* and Co., and the latter, if called upon in consequence of this agreement between them and *Brown* and Co. to pay the amount of the bill to *Kewley* and Co. might have answered, it is true that we have admitted *Brown* and Co. to be our debtors for the amount of the bill, but what use can you a third party make of that agreement between us? I think it clear that *Caldwell* and Co. could not have been charged by *Kewley* and Co. in consequence of any thing that passed between the former and *Brown* and Co., and that the debt between *Brown* and Co. and *Kewley* and Co. remained no further discharged than all debts are for which a bill not due is given in payment. We think therefore that the learned Judge was right in rejecting the evidence offered by *Brown* and Co., 1st, because evidence of what passed between themselves and *Caldwell* and Co. without the privity of *Kewley* and Co. could not bind the latter; and, 2dly, because if admitted it would have been of no avail. On the 1st point I have already said we are of opinion that the check was never accepted by *Kewley* and Co. in payment of their debt, and consequently that *Brown* and Co. at the time this action was brought remained debtors to them for the value of the goods.

Per Curiam,

Judgment affirmed.

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Nov. 16th.

HARRIS v. MANLEY.

An indorser of a bill of exchange may be bail for the drawer in an action against him upon the same bill.

AN indorser upon a bill of exchange was brought up to justify as bail in an action against the drawer of the same bill.

Best Serjt. objected that he ought not to be admitted, inasmuch as the Plaintiff's security would not be increased by the recognition of the indorser, who was already liable to the Plaintiff upon the bill.

Onslow Serjt. on the other side stated that a similar objection had been taken to a person who came up to justify as bail in the *King's Bench* in an action against the *Portland-Place Bank*, and had been overruled.

The Court (*absente* Lord *Alvanley* Ch. J.) thought the objection of no weight, and accordingly

Admitted the bail.

Nov. 19th.

GRIGBY v. OAKES and Another.

Bank notes are not made a legal tender by the 37 Geo. 3. c. 45.

THIS was an action on a promissory note; the Defendants as to all but five guineas pleaded *non assumpsit*, and as to the remaining five guineas they pleaded a tender. The cause came on to be tried at the Summer Assizes for *Suffolk*, before Mr. Baron *Hotham*, when a verdict was found for the Plaintiff, with one shilling damages, subject to the opinion of the Court upon the following case.

"The Defendants are bankers at *Bury St. Edmunds*, and issued the note in question for five guineas, payable on demand to the bearer. On the 31st *January* last the Plaintiff carried several notes to the shop of the Defendant and demanded payment. He first presented other notes, to the amount of 50 guineas, for which he received payment, partly in Bank of *England* notes and partly in cash, the cash being ten pounds, and being the proportion of money they usually pay. He then presented the note in question, for which the Defendants tendered in payment a 5*l.* Bank of *England* note and five shillings in silver. This the Plaintiff refused on the ground that the tender was partly in a Bank of *England* note,

objecting

objecting to such note, and insisted on being paid wholly in money. The Defendants refused to pay wholly in money. The Plaintiff did not at the time say he wanted money for his own particular accommodation, but stated that he came on purpose to have cash for the note, or to bring an action if payment in money was refused.

The question for the opinion of the Court was, Whether, under the circumstances before stated, the Plaintiff was entitled to recover?

Shepherd Serjt. for the Defendants argued, that though unquestionably previous to the passing of the 37. Geo. 3. c. 45. commonly called the Bank Act, a bank note would not have been a legal tender, yet that since the passing of the above act such notes must be considered as cash, for that the necessary consequence of the above act being to absorb a vast proportion of the actual cash of the country, the Legislature must have intended to give a new character to bank notes by way of substitute; that they had specifically declared them to be a good tender so as to prevent an arrest, and yet if the same spirit which actuated the present Plaintiff in the commencement of this action was to continue to influence his conduct, and that of others also, a Defendant, though exempted from arrest, might ultimately be taken in execution though ready to pay in bank notes, since he might possibly be unable to satisfy the judgment obtained against him altogether in money; because even if a sale of his goods took place, the sheriff might not be able to avoid receiving a large proportion of bank notes from the purchasers; that indeed in some respects bank notes were privileged by the 37. Geo. 3. c. 45. beyond cash, inasmuch as a tender of them in satisfaction of a debt operated to discharge a party from arrest, which was not the case with a tender of money, which must be pleaded in bar; and that no contrary inference could be drawn from the 8th section of the act, which declared payments in bank notes to be equivalent to payments in cash, *if made and accepted as such*, because that must have been the case before the passing of the act, and therefore that clause must be deemed nugatory.

Sellon Serjt. *contra* was stopped by the Court.

Lord ALVANLEY Ch. J. The question for the Court to decide is a mere question of law, arising, as it has been contended, out of the provisions of the 37 Geo. 3. c. 45. In fact we are called upon to say, whether it follows as a necessary consequence from that act

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that a tender in bank notes is equivalent to a tender in money? It may be very true that individuals may be occasionally subjected to great inconveniencies from the operation of that act; but are we therefore to say that the Legislature has enacted that which the provisions of the act do not warrant? If we were at liberty to refer to our own private knowledge of the language that was held in Parliament while this act was pending, no doubt could be entertained upon the subject. We know that it was very much canvassed by many persons at that time, whether or not the Legislature ought to go the length of declaring bank notes a good legal tender? If therefore it had been intended by the Legislature so to make them, that intention would have been expressed in such clear terms that no question could have arisen upon the subject. Indeed it is expressly provided in the 2d section of the act, that if the Governor and Company of the Bank of *England* shall be sued on any of their notes, or for any sum of money, payment of which in their notes the party suing refuses to accept, they may apply to the Court in which such proceedings are instituted to stay proceedings during such time as they are restricted from paying in cash. But with respect to individuals it was not intended to prevent any creditor who should be so disposed from capiously demanding a payment in money, though such a creditor is deprived of the benefit of arresting his debtor. Thank God few such creditors as the present Plaintiff have been found since the passing of the act! But yet whatever inconveniencies may arise, and to whatever length they may go, Parliament and not this Court must be applied to for a remedy. Inconvenience arising from the operation of an act of Parliament can be no ground of argument in a Court of Law; and even if it were, still I should entertain no doubt that it was the intention of the Legislature to make bank notes a legal payment only in certain cases by them expressed, and that in all other cases they should remain upon the same footing upon which they stood before the act, except as to the exemption from arrest which they afford to the party tendering them in payment. The 8th section of the act, which has been treated as nugatory in the argument, however it may enact nothing new, still appears to me pregnant with the intentions of Parliament, and to speak loudly the resolution not to alter the character of bank notes but in those cases which are specially provided for. Without however referring to any of those specific clauses, and arguing from

them as to the intent of the Legislature, I should be clearly of opinion that the present Plaintiff is entitled to our judgment in his favour.

HEATH J. I am of the same opinion. The question for us to decide is, Whether a tender in bank notes is a good legal tender? Now the 37 Geo. 3. c. 45. appears to me to negative that question; for the several provisions of the act making them a good legal tender in certain excepted cases excludes the idea of their being so generally in cases not provided for by the act. It has been argued however that the operation of the act will in many cases be very injurious, unless we determine it to be a necessary inference from the act that bank notes were intended by the Legislature to be put upon the same footing as cash. But whatever inconveniences may arise, the Courts of Law cannot apply a remedy. I think indeed the Legislature acted wisely, having the recent example of *France* before their eyes, to avoid making bank notes a legal tender; for in *France* we know that legislative provisions of that kind in favour of paper currency only tended to depreciate the paper it was designed to protect, and were ultimately repealed as injurious in their nature.

ROOKE J. I am of the same opinion.

CHAMBRE J. This case appears to me almost too plain for argument. It has been thought that the Courts went a great way in holding a tender in bank notes to be a good tender, if not objected to at the time (a). Certainly that was an innovation; though perhaps a beneficial one. But the act upon which the present question arises affords nothing but arguments against the inference attempted to be drawn from it. Surely the observation that in some respects the Legislature have put bank notes on a more favourable footing than cash, leads to a conclusion directly contrary to that which it was intended to support. If the Legislature have not gone far enough, it is for them, not for us to remedy the defect. Indeed, by making bank notes a good tender in certain cases specifically provided for, they appear to me to have negatived the construction we are now desired to put upon the act.

Postea to the Plaintiffs.

(a) See *Wright v. Reed*, 3 Term Rep. 554.

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HUNTLEY v. LUSCOMBE.

Service of a demand of a copy of the commitment on the turnkey of a prison is not sufficient to support an action against the gaoler for the penalty incurred by him under the habeas corpus act, for not delivering the copy to the prisoner within due time after the demand made, if the gaoler himself were in the prison. *Quære*, Whether a commitment in execution for a penalty on conviction before a magistrate for an offence against the Excise Laws, be a commitment for "a criminal matter," within the provisions of the habeas corpus act, so as to entitle a prisoner to an action against the gaoler for not delivering a copy within a certain time after demand made?

THIS was an action on the case against the Defendant as keeper of the gaol at *Portsmouth* for not delivering to the Plaintiff, who stood committed and detained in his custody, "under and by virtue of a certain warrant or certain warrants of commitment and detainer for a certain supposed criminal matter not being felony or treason," a true copy of the warrant of commitment.

The cause was tried before *Thompson* Baron, at the last Spring Assizes at *Winchester*, when it appeared that the Defendant was in custody under a warrant of commitment, granted by two Justices in consequence of a return of *nulla bona* to a previous warrant of distress to levy a penalty of 20*l.* recovered against the Plaintiff for an offence against the excise laws. The warrant of commitment authorised the officers to whom it was directed "to take and arrest the body of the said *H. Huntley* (the Plaintiff), and forthwith to carry the same to the gaol or prison of and for the borough or place where they should take and arrest the same, and the same, together with a duplicate of the warrant there to deliver into the custody of the gaoler or keeper of the said gaol or prison of and for the said borough or place, there to remain in safe custody until she should satisfy and pay the sum of 20*l.* by the said Justices adjudged against her on an information exhibited against her by *J. P.* as well on behalf of his Majesty as of himself for a certain offence committed by the said *H. Huntley* against the laws and statutes of excise, whereof she stood convicted." At the trial it was proved that one of the persons then in confinement in the prison, on the part of the Plaintiff served the turnkey on the 25th of *November* with a notice directed to the Defendant of a demand of a copy of the warrant, and that on the 27th the turnkey delivered to the Plaintiff a copy of the warrant indorsed by the Defendant; whereas by the 31 *Cur. 2. c. 2. s. 5.* such copy is required to be delivered within six hours after the demand. The Defendant was resident in a house, the door of which opened into the prison yard.

It was objected on behalf of the Defendant, in the early part of the trial, that the notice of a demand of a copy having only been

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served on the turnkey, there was no evidence as to the time at which it came to the Defendant's hands. The learned Judge overruled the objection, but said he would reserve it for the Defendant's counsel, in case they should be inclined to move the point. Afterwards it was objected that the commitment under which the Plaintiff had been detained being only for the non-payment of a penalty, was to be considered as a commitment in execution in a civil matter, in which case the 31 *Car. 2. c. 2. s. 5.* upon which the action was founded would not apply. Upon this point the learned Judge nonsuited the Plaintiff, with liberty to move that the nonsuit might be set aside, if this Court should be of a different opinion.

Accordingly a rule *Nisi* for that purpose having been obtained in the course of last *Easter Term*,

Leas Serjt. shewed cause in *Trinity Term* last. Two objections arise in this case, first that the offence for which the Plaintiff was committed was not a criminal or supposed criminal matter; and secondly, that he was committed in execution. The preamble of the 31 *Car. 2. c. 2.* recites that great delays had been used by sheriffs &c., to whose custody any of the King's subjects had been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus* to them directed; and then proceeds to make several provisions for the relief of the subject in that respect. Now one of the means offered to the party in custody for procuring that ease which is the object of the statute is the enabling him to demand a copy of the warrant under which he is committed, and punishing the gaoler who neglects to grant it within a given time. But not only the previous provisions with respect to the granting a return of the *habeas corpus*, but also this mode of obtaining information of the offence for which the party is detained, have reference to the words in the preamble, "any of the King's subjects committed for criminal or supposed criminal matters." And the third section uses the words "committed for any crime:" and the fifth section which authorises prisoners to demand a copy of the warrant, for the purpose of enabling them to obtain their *habeas corpus*, must certainly be confined to those persons who are entitled to an *habeas corpus* under the third section. Indeed, the Plaintiff in this declaration has alleged that he was committed for a supposed criminal matter; unless therefore that allegation be supported by the evidence, the Plaintiff must

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fail. But the commitment is only for non-payment of a penalty of 20*l.* incurred by a breach of the excise laws, which must be considered as a civil matter. All suits in the Exchequer for penalties of this nature, though in the name of the King, are considered as civil suits; for the Court of Exchequer is not a criminal court (*a*). There can be no doubt that if the 5th section is to be connected with the 3d section, this action cannot be maintained. For the 3d section expressly excepts from its provisions "persons convicted or in execution by legal process;" under which exception the present Plaintiff falls: and that the 3d and 5th sections are to be connected appears evident, because the former having directed the nature of the returns to writs of *habeas corpus*, the latter enacts, that if the officers neglect to make the returns *aforesaid*, or bring the body or bodies "of the prisoner or prisoners," that is the prisoners provided for in the 3d section, they shall be punished. So at the end of the 5th section the penalties are given to "the prisoner or party grieved;" that is, the prisoner or party against whom the officers have offended by omitting to comply with the directions of the 3d section.

Shepherd Serjt. in support of the rule. The 5th section of the *habeas corpus* act extends not only to those writs of *habeas corpus* which are given by that act, but to all other writs of *habeas corpus* at common law; now although a person in execution be not en-

(*a*) *The Attorney General v. John Dowman*.
Sittings at Westminster, coram Eyre Ch. B.
16th Jan. 1791.

Upon the trial of an information against the Defendant for keeping false weights, and for offering to corrupt an officer, the Defendant's counsel called a witness to character. The evidence being objected to by the Court,

Plumer for the Defendant urged, that it was admissible as tending to shew that the Defendant was incapable of the crime imputed to him. He said that such evidence had been received on the *Oxford Circuit* in an action upon the statute for cheating at play, imputing a general fraud; and that he believed it had also been received in a revenue prosecution in the Exchequer, either for forging or making use of a false stamp.

Newnham contra insisted that such evidence had never been received in any penal

action, and that the information was not a criminal proceeding, for that Lord Chief Baron *Parker* had often said that the Court of Exchequer had no criminal jurisdiction.

ETYRE Ch. B. I cannot admit this evidence in a civil suit. The offence imputed by the information is not in the shape of a crime. It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime but for the penalty, as in this information, it is not. If evidence to character were admissible in such a case as this, it would be necessary to try character in every charge of fraud upon the Excise and Custom-House Laws. The Defendant may move the Court upon the ground of evidence having been rejected which ought to have been received, but I am of opinion that the evidence offered is not admissible.

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titled to an *habeas corpus* under the new jurisdiction created by the 3d section of that act, yet he is clearly entitled to an *habeas corpus* at common law. But if the provisions of the *habeas corpus* act are extended only to such writs of *habeas corpus* as are granted under the directions of that act, all other writs of *habeas corpus* might in vain be issued by the courts, since the penalties imposed by the act for disobedience would not in such cases affect the officers to whom they were directed. Indeed it is clear from the act itself, that the 5th section was intended in some cases to extend further than the 3d section; for the 2d section, which directs officers to make returns of writs of *habeas corpus* directed to them, extends to all commitments except those in which treason or felony is plainly expressed in the warrant, and the 5th section imposes a penalty upon officers neglecting or refusing to make "the returns aforesaid," which must extend to the returns mentioned in the 2d section. It may be observed that the 3d section seems to stand by itself; whereas the other parts of the act extend to all commitments except those in which treason or felony is expressed in the warrant. No evil can well arise from the construction contended for on the part of the Plaintiff, whereas great danger may ensue from a contrary construction; for a prisoner who gets a copy of his commitment does not of course obtain his discharge, but only where he is committed improperly; whereas to hold that a prisoner in execution is not entitled to a copy of his commitment, will suggest an effectual mode of preventing every prisoner from obtaining his discharge from any commitment, however illegal, as for instance a commitment for six months, where the law only authorises a commitment for three months; because if the commitment be but framed in the shape of a commitment in execution, the party committed not being able to procure a copy of his commitment will not be able to ask for that relief to which he is entitled. With respect to the question, whether the offence for which the Plaintiff was committed is to be considered as criminal matter, it seems clear from the nature of the proceeding that it must be so considered. The statute of 35 Geo. 3. c. 113. s. 7. imposes a penalty for the particular breach of the Excise Laws of which the present Plaintiff was guilty, and enacts that it may be recovered by action of debt or information. Now although it might have been contended, if the action of debt had been resorted to, that the subject matter of the action must be considered to

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be of a civil nature, yet as the penalty has been recovered by information before a Justice, it cannot be viewed in any other light than as a proceeding for a criminal matter. Giving a pecuniary penalty by way of punishment cannot alter the nature of the offence.

The Court desired the case might stand over until this Term, saying it was of great importance, and they should probably consult the other Judges upon the point.

Early in this Term Lord *Alvanley* Ch. J. observed that the 1st objection taken at the trial, which appeared upon the learned Judge's report, had not been spoken to at all, and desired there might be a further argument of the case upon that point.

Accordingly on this day *Williams* Serjt. on the part of the Defendant contended, that as this was an action to recover a penalty, the Plaintiff should be strictly held to shew that the Defendant had committed the offence on which the penalty attached; that as the notice of a demand was only served on the turnkey, it did not appear that it ever came to the hands of the Defendant, and that it clearly appeared from the conduct of the Defendant that he had no intention to withhold a copy of the warrant, since he actually delivered one the next day but one after the demand made.

Best Serjt. *contra*, insisted that the *habeas corpus* act was not to be considered as a penal statute, but on the contrary a highly remedial law; that the provision in question was framed in a different manner from all penal provisions whatsoever, inasmuch as the Legislature in case of the death of the offending party had given a right of action against his executors and administrators; that the title of the statute demonstrated the intention of the Legislature to make it a remedial law, it being intitled "An act for the better securing the liberty of the subject, and for prevention of imprisonments beyond the seas;" and that it therefore required the most liberal construction. He cited the words of the 5th section of the act, "that if any officer or officers, his or their under-officer or officers, under-keeper or under-keepers, or deputy, shall neglect or refuse to make the returns aforesaid (*viz.* the returns to writs of *habeas corpus*), or to bring the body or bodies of the prisoner or prisoners, according to the command of the said writ, within the times aforesaid, or upon demand made by the prisoner or person in his behalf, shall refuse to deliver, or within the space of six hours after demand shall not deliver to the person so demanding a true

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copy of the warrant or warrants of commitment and detainer of such prisoner, which he and they are hereby required to deliver accordingly, all and every the head gaolers and keepers of such prisons and such other person in whose custody the prisoner shall be detained, shall for the 1st offence forfeit to the prisoner or party grieved the sum of 100*l.*, and for the 2d offence the sum of 200*l.*, and shall and is hereby made incapable to hold or execute his said office, the said penalties to be recovered by the party grieved, his executors or administrators, against such offender, his executors or administrators." He then argued that it appeared clearly from these words to have been the intention of the Legislature that in case of default by any of the inferior officers, the head gaoler should be responsible, and that this agreed with the general principle of law *respondeat superior*; that the same intention further appeared from comparing the above section of the act with the 2d section, which directs "that whensoever any person or persons shall bring any *habeas corpus* directed unto any sheriff or sheriff's gaoler, minister, or other person whatsoever, for any person in his or their custody, and the said writ shall be served on the said officer, or left at the goal, that the said officer or officers, his or their under-officers, under-keepers or deputies, shall within three days make return of such writ and bring up the body;" for that if the gaoler was subjected to penalties for neglecting to obey a writ of *habeas corpus* left at the gaol, the probable intention of the Legislature was that he should also be liable for neglecting to give a copy of the warrant within six hours after demand made upon the turnkey; and that if this construction were not to prevail, the provisions might be defeated by the principal keeping out of the way.

Lord ALVANLEY Ch. J. I assent to the argument which has been advanced in favour of the Plaintiff, so far as it goes to state that the *habeas corpus* act is a remedial law; and that the Judges of every court are bound to enforce its provisions according to their spirit, in such a manner as most effectually to relieve the subject from illegal imprisonment. But though it be a remedial law so far as it respects those persons for whose protection it was framed, it is grievous in its penalties with respect to those persons who neglect the duties thereby imposed upon them. It is remedial *quoad* some persons, but it is penal *quoad* others. It becomes incumbent upon the Court therefore to take care that those who claim the benefit of this act have used due diligence on their own part, and that they avail themselves

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themselves of the provisions of the act for the real purpose of obtaining the rights intended to be secured to them. Though we are bound to look with jealous eyes at all those who may be suspected of having wilfully infringed the provisions of this act, we must still take care that no person makes use of so remedial a law for the purpose of loading with penalties those who, if they had had notice, would not have disobeyed its directions. If a prisoner therefore be desirous of availing himself of that part of the statute which inflicts a penalty on the gaoler for neglecting to comply with his demand of a copy of his warrant of commitment, he must so conduct himself that there may be no reason to suspect that the object of his demand was not a copy of the warrant, but an opportunity to bring an action. The question then in this case is, on whom ought the service of the demand to have been made? I admit that it is sufficient if the service be made upon the person who has the custody of the prisoner; and that if the principal be not present and accessible to the prisoner, that service on the deputy who at that time has the custody of the prisoner will make the principal answerable. But in construing the words "officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy," may we not understand them to relate to the principal in the first place, and if he be not present then to any other person who in his absence shall have the custody of the gaol? Can we suppose that they were intended to extend to every porter at the gates of the prison? or can we say that a turnkey is an under-keeper within the true meaning of the expressions; it being stated that the gaoler was at that time in the gaol, and therefore accessible to all the prisoners? The case then stands thus. A prisoner about six o'clock in the evening puts into the hands of an ignorant turnkey, notice of a demand of a copy of the warrant, directed to the gaoler; the turnkey is not called as a witness; it does not appear that the nature or exigency of the demand was explained to him, possibly he could not read, and if he could the notice does not express the exigency of the demand, and the turnkey was not at the time the keeper, the under-keeper, or the deputy, since the principal was amenable to the notice. But was the notice put into the hands of the turnkey for the purpose of obtaining that which was the object of the demand? It does not appear ostensible that the Plaintiff made any inquiry, or took any pains that the notice should come to the hands of the Defendant; yet there was a

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door to the Defendant's house which opened into the yard of the prison, and if it had been intended by the Plaintiff that the demand should be literally complied with by a delivery of a copy of the warrant by 12 o'clock at night, is it to be conceived that he would have been so remiss? If indeed he had been informed at the door that the Defendant was not accessible, leaving a notice at the door might have been sufficient; for the gaoler is bound to have some person to answer for him: but I cannot think that this service upon a common turnkey is such a reasonable and proper service as to entitle the Plaintiff to maintain an action which seeks to recover a heavy penalty denounced by the Legislature against persons wilfully neglecting their duty, in order to facilitate the delivery of prisoners from illegal imprisonment. He who seeks a remedy must do his part: and if it appear to the Court that this object is not a copy of the warrant, but an action; or if by his conduct he has brought the Defendant into a situation in which he would not have been placed had he had reasonable notice, I cannot think that the efficacy of the statute will be done away, by holding that the Plaintiff has not entitled himself to maintain an action for the penalty against a person with whom he has so dealt. Without therefore entering into any discussion upon the former point, I am of opinion that the nonsuit was right.

HEATH J. I entirely concur in opinion with my Lord; but as this is a matter of consequence, and respects an act which is deservedly popular, I shall deliver my opinion the more at large. In the first place, therefore, though I admit that this is a remedial statute, (and if I know my own heart, I should be the last person to concur in any decision tending to weaken this act, which was made to secure the liberty of the subject,) yet I consider it as penal with respect to this Defendant. We must therefore take particular care that its provisions are not perverted to purposes of iniquity and oppression. The governor of the gaol being present, I think it was necessary that the Plaintiff or some person on his behalf should have made a demand on him; or should at least have demanded access to him. It does not appear but that if any person had desired to see the governor, he might have done so. Instead of this a notice is put into the hands of the turnkey, without any explanation of its contents; the governor being at that time in the gaol. I agree that the second and fifth sections of the act must receive the same interpretation. The reasonable construction

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struction is, that if the governor be present there is then no deputy or under-keeper on whom the service can be made; but if the governor be not present then the deputy may be served; and if the deputy have no deputy, then in the absence of the deputy service may be made on the turnkey, or may be left at the gaol, for it is the duty of the governor to leave some person in his place. The rule *respondeat superior* only applies where the superior is absent. This being the case, according to my apprehension of the second and fifth sections of the act, the service of the notice was not sufficient. I am therefore of opinion that the action in this case is not maintainable, especially as there is reason to believe that this service of the notice was only intended as a snare to entrap the Defendant.

ROOKE J. I should be as unwilling as any man to concur in any thing injurious to the rights of the subject. The *habeas corpus* is a very wise and beneficial statute: and the Judges have always been disposed to put such a construction upon it as will favour the real liberty of the subject. But we must be careful that those acts which have been made for the benefit of the subject, are not turned into engines of oppression: nor must we, under the idea of promoting general liberty, withhold that degree of favour from individuals which is consistent with the security of the public. It appears to me therefore that gaolers are entitled to all the protection which the law can afford them consistently with the liberty of the subject. By the fifth section of the act it is provided, that if any officer, his under-officers, under-keepers, or deputy, shall neglect or refuse to make return to a writ of *habeas corpus*, or bring up the body, as directed by the second section, or upon demand made shall refuse or neglect to deliver within six hours a copy of the warrant of commitment, the head gaolers and keepers, and such other persons in whose custody the prisoner shall be detained, shall be liable to a penalty. Now I think the true construction of this latter part of the act is, that if the gaoler be within the gaol and accessible, the demand must be made on him; but if he be not accessible it may be made on the deputy. At any rate, however, the demand should have been served in such a way that the person to whom it was delivered should understand its nature, and some pains should have been taken that it should come to the hands of the principal. On this view of the statute, and of the circumstances of this case, I can neither reconcile it to justice nor to a love of li-

berty to hold that the Defendant in this action is liable to the penalty. Such a doctrine would be founded on no principle but that of oppression. In this case I suspect that the notice was delivered for the express purpose of founding an action; and if it be possible that the provisions of the statute should be so perverted, it is our duty to take care that such a perversion should be prevented.

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CHAMBRE J. I entirely concur with the rest of the Court in the construction which has been put upon this statute, and I have little to add to what has already been said. There is no doubt that this act is to be considered as a remedial act, and indeed the most highly remedial act which stands upon the statute book. But the most remedial act may contain penal clauses; and if the argument which has been urged on the part of the Plaintiff were found, this act would be most oppressive in its consequences; since it might subject a person to heavy penalties, and perhaps to an incapacity to hold his office, though he might be as innocent as any man living. It is true that the disability to hold the office is not incurred upon the first conviction: but the first conviction is one step towards it, and if a person may innocently become liable to a first conviction, he may in the same manner become liable to a second. This statute therefore is highly penal in these respects. At the same time we must not fritter away the salutary provisions of the act by too liberal a construction. The words of the statute "officer or officers, his or their, under-officer or under-officers, under-keeper or under-keepers, or deputy," are all descriptive of the persons having the actual custody of the prisoner at the time, and if there were any doubt upon this point, I think that the conclusion of the clause which subjects "the head gaolers and keepers of such prisons, and such other person in whose custody the prisoner shall be detained," (a) to the penalties, would operate strongly to explain that doubt. Whatever the views of the Plaintiff may have been in bringing this action, she has certainly not proved her case

(a) It may be observed, however, that the expression "other person having prisoners in his custody," is used in the second section to denote the superior officer of the prison, in contradistinction to his under-officers: it should seem therefore that when the fifth section provides that in case of any default either of the superior or inferior of-

ficers, "the head gaolers and keepers, and such other persons in whose custody the prisoner shall be detained," shall be liable to the penalty, it must be construed to impose the penalty upon the superior officers of the prison only, and not on the person in whose actual custody the prisoner may be at the time.

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as satisfactorily as she might have done; she has been remiss in not calling the turnkey to shew at what time the notice came to the hands of the Defendant. Service on a turnkey may be good for many purposes, but we must look to the nature of the present demand in order to decide whether it be good or not in this particular case. It is the duty of a turnkey to take care of the door; could he therefore have complied with this demand? If then the demand never came to the hands of the principal, where is the justice and where is the advantage to the public in subjecting him to the penalty for non-compliance with the demand? Upon the whole, I am perfectly satisfied with the construction which has been put upon this act of Parliament.

Rule discharged.

Nov. 20th.

SCHOLEY v. DANIEL.

A. being indebted to *B.* in 700*l.* applied to *C.* to lend him that sum, who agreed so to do provided *A.* would allow him to deduct therefrom 80*l.* due from *B.* to himself upon stock-jobbing transactions. Accordingly *C.* advanced 620*l.* and *A.* gave him a promissory note for 700*l.* *A.* then paid over to *B.* the 620*l.* who gave him a discharge for the whole 700*l.* The promissory note for 700*l.* given by *A.* being paid when due, *B.* brought an action against *C.* to recover 80*l.* as money had and received by *C.* to his use. Held that *B.* could not maintain the action, but that it must be brought by *A.* if by any one.

THIS was an action for money had and received.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last Term, it appeared that the Plaintiff's son being indebted to him in the sum of 700*l.* and being pressed for payment represented his situation to the Defendant, and applied to him for the loan of 700*l.*; the Defendant answered that he would have nothing to do with the Plaintiff, for that the Plaintiff was already in his debt upon stock-jobbing transactions to the amount of 80*l.* which he had refused to pay; but that he, the Defendant, would lend the Plaintiff's son the money if he would allow him to deduct the 80*l.* which his father owed; that the Plaintiff's son acceded to this offer, and accordingly received 620*l.* from the Defendant, and gave the latter his promissory note for 700*l.* and lodged with him the lease of a house as a collateral security; that the Plaintiff's son repaid his father 620*l.* and that his father resolving that the Defendant should not retain the 80*l.* gave his son credit in account for the 80*l.* which he had paid to the Defendant, and considered the debt between his son and himself satisfied; the note for 700*l.* being paid when due and the lease restored to the son, the present Plaintiff commenced this action to recover the 80*l.* which the Defendant, in order to repay himself a debt founded on

an illegal consideration, had deducted from the 700*l.* advanced to his son. A verdict was taken for the Plaintiff, reserving liberty to the Defendant to move the Court that this verdict should be set aside and a nonsuit entered.

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Accordingly a rule *nisi* having been obtained for that purpose,

Best Serjt. now shewed cause, and contended that it appeared clearly from the evidence that the Defendant had obtained money without consideration which he had no right to retain, but that the only question was, who ought to have brought the action? that the Plaintiff's son having received credit in account for the amount of the sum retained, had no cause to complain, and that he therefore could not be entitled to any action against the Defendant; but that the father, who was the only loser by the transaction, had clearly a right to maintain this action, the object of which was to recover that sum of money from the Defendant which he unjustly retained, and which the Plaintiff ought to receive.

Shepherd and *Bayley* Serjts. insisted that as the money which had been received by the Defendant was neither paid by the Plaintiff nor with his money, he could not be entitled to maintain this action; and that any transaction between the Plaintiff and his son to which the Defendant was no party could not vary the case.

LORD ALVANLEY Ch. J. This is not money had and received to the use of the father. The son has thought fit to pay a sum of money to the Defendant, but there was no transaction between the Defendant and the father. There was no undertaking either express or implied on the part of the Defendant to repay this money to the Plaintiff; and the Plaintiff's son, if any one, ought to have brought the action.

HEATH J. I think there can be no doubt on the question. It was the policy of the common law to forbid the transfer of rights of action. If this were not forbidden men would often pay the debts of others and bring actions upon them to the great increase of litigation.

ROOKE and CHAMBRE Js. were of the same opinion.

Rule absolute.

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Nov. 20th. ROE ex dim. PELLATT and Others v. FERRARS, Clerk.

J. S. demised lands to the rector of D. for 40 years at a certain rent; in the lease the rector, after covenanting for payment of the rent, further granted to J. S. the tithe of oats of the parish of D.; the lease also contained a proviso for re-entry in case the rent should be in arrear, or J. S. his heirs, &c. should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of J. S. that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease. After the expiration of the lease the rector continued to hold the land, but withheld the rent for more than 20 years, the heirs of J. S. at the same time continuing to take the

THIS ejectment was tried before *Heath J.* at the *Lent Surrey Assizes*, and a verdict found for the Plaintiff as to certain lands called *The Sharps*, situate in the parish of *Beddington*, subject to the opinion of the Court, whether the Plaintiffs' right of recovery in this action was not barred by the statute of limitations.

The lessors of the Plaintiff, who were lords of the manor of *Beddington*, sought to recover these lands as parcel of the manor, and the Defendant, who was rector of the parish of *Beddington*, disputed their title claiming them as parcel of the rectorial glebe. The lords of the manor of *Beddington* had the right of presentation to the rectory; and were also entitled to a portion of the tithes. At various times there had been a mutual interchange of lands and tithes between the lords of the manor and the rectors, which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the Plaintiff a deed was produced, dated on the 18th of *November 1703*, by which the then lords of the manor demised to one *Richard Reddall*, parson of *Beddington*, the lands in question (among others) for 40 years, "yielding and paying therefore yearly during the said term, the sum of forty-three shillings and fourpence, and also paying and delivering yearly during the said term at the barn-door, in the yard of the mansion house, all the tithe straw both of wheat and rye coming and growing within the parish of *Beddington*, and also 7 quarters of wheat, 4 quarters of rye, and 30 quarters of barley." The deed then went on, "and the said *Richard Reddall*, for himself, his executors, &c. doth covenant, promise, and grant to and with the said Sir J. J. &c. (the lords of the manor), their heirs, &c. that he the said *Richard Reddall* shall not only well and truly pay, or cause to be paid from time to time, and at all times during the continuance of this present demise unto the said Sir J. J. &c. their heirs, &c. the said yearly rent of forty-three shillings and fourpence at the said mansion-house, but also shall and will deliver the said tithe straw, to-

tithe of oats, and some confusion existing as to the respective rights of the rector and the heirs of J. S. the latter being portionists of the tithes of the parish. Held that the possession of the land by the rector was not adverse, so as to let in the operation of the statute of limitations.

If a Defendant give in evidence an answer in Chancery of the Plaintiff, it will not entitle the Plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay. *Semb.*

gether with the said wheat, rye, and barley, in such manner and form as the same shall grow due and payable by virtue of these presents; and further the said *Richard Reddall* doth grant unto the said Sir J. J. &c. their heirs, &c. that they shall have and enjoy all the tithe oats hereafter to be arising or growing within the said parish of *Beddington*, to be yearly taken by the said Sir J. J. &c. their heirs, &c. during the said term (except the tithes of the glebe lands and portionary hereby demised, while it is in the said parson's own occupation); provided always that if the said yearly rent of forty-three shillings and fourpence, or any part thereof, shall be behind and unpaid by the space of one-and-twenty days, next after any of the feast days on which the same ought to be paid as aforesaid, being lawfully demanded, or if the said corn or straw above-mentioned be not well and truly delivered in manner and form aforesaid, within 14 days next after request thereof made as aforesaid, or if the said Sir J. J. &c. their heirs, &c. shall be molested or troubled by the said *Richard Reddall* or his assigns, in taking or enjoying the said tithe-oats by these presents mentioned to be granted as aforesaid, that then and from thenceforth it shall and may be lawful for the said Sir J. J. &c. their heirs, &c. into the said demised premises, with all and singular their appurtenances to re-enter, and the same to have again as in their former estate." At the conclusion of the deed there was a covenant by the lords of the manor, that "the said *Richard Reddall* and his assigns shall quietly and peaceably enjoy the said demised premises, paying the yearly rent, and under the covenants, grants, and agreements before in these presents contained, without any lawful let or interruption of them the said Sir J. J. &c. their heirs, &c. during the said term." To rebut this evidence, and shew an adverse possession, the Defendant read an answer to a bill in equity of a late date, filed by himself against the lessors of the Plaintiff, for an account of the tithe of oats which he then claimed, in which, though they did not mention the deed of 1703, yet they referred to a similar lease of a much older date, and stated that such leases had from time to time been granted to the rectors by the lords of the manor, and that about 1753, upon some dispute between Sir *N. H. Carew* the then lord of the manor and the Reverend *John Pryce*, then incumbent of the living of *Beddington*, the latter taking advantage of the former being a man of an indolent temper and inattentive to business, withheld the rents reserved on the lands in question, but permitted him to continue to take the tithe

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of oats. Upon the above part of the answer being read in evidence by the Defendant, the counsel for the Plaintiff also read the following sentence from the same answer: "That the lessors of the Plaintiff had heard as truth that the said *John Pryce* did pay or deliver to the said Sir *N. H. Carew*, divers quantities of corn and straw, and that the said Sir *N. H. Carew* did receive the tithe of oats within the said parish;" which corn and straw he insisted were delivered by way of render, and the tithe of oats received in consideration of the demise, and on the footing of the several agreements contained in the several leases. No rent appeared to have been paid by the rectors of *Beddington* to the lords of the manor since the year 1753; but the latter continued to take the tithe of oats until a decree made in favour of the rector in consequence of the above-mentioned bill in equity. The present Defendant was instituted to the living of *Beddington* in the year 1782, and it was not till after that period that the lease of 1703, which had been lost, was discovered.

A rule *nisi* for setting aside the verdict having been obtained in *Easter* Term last, the case was argued by *Best* Serjt. for the Plaintiffs, and *Shepherd* and *Bayley* Serjts. for the Defendant, and the Court took time to consider of their opinion, during which time Lord *Alvanley* succeeding to the situation of Chief Justice, it was again argued on a former day in this Term by the same counsel.

Arguments for the Plaintiffs. It is perfectly clear that the statute of limitations cannot operate unless an adverse possession in the Defendant be satisfactorily established. Now in the present case the possession of the several incumbents of the living of *Beddington* must be deemed the possession of the lords of the manor of *Beddington* until a very strong case can be made out to prove that the tenancy under which the former originally came into possession of the premises had completely determined. But here though the rents reserved in the lease of 1703 have not been paid for above 20 years to the lords of the manor, still as the latter have been permitted to take the tithe of oats up to a very recent period, the possession of the incumbent is a mere possession by consent of the lords; for as long as any part of the rent reserved continues to be paid, the possession is not adverse. It is to be observed that the grant of the tithe of oats to the lords of the manor is not contained in a distinct deed, but is part of that very lease under which the

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lands in dispute were demised to the incumbents of the living, and forms one of the express terms of the deed. It is true that it is not part of the *reddendum*; but being inserted in the same deed, it must be taken to be part of the consideration of the demise. That it was part of the consideration is manifest from the clause of re-entry which is limited to take effect not only in case of the rent being behind or unpaid, but in case the lords of the manor should be molested or troubled in taking the tithe of oats. And this is strongly confirmed by the covenants on the part of the lords of the manor with which the deed concludes, that the lessee shall quietly enjoy the premises, "paying the yearly rent, and under the covenants, grants, and agreements before in these presents contained." Possibly in the year 1753 the *Carew* family finding the rent reserved too large, agreed with the then rector to allow him to retain the lands in question for the single consideration of the tithe of oats, remitting all the other renders.

Arguments for the Defendant. Had the incumbents of the living of *Beddington* been holding up to the present period under an existing lease, their refusal to pay rent would not have created an adverse possession. But here the lease under which the tenancy commenced, expired in 1743, since which time they have claimed to hold *proprio jure*. The refusal to pay the rent was a disclaimer of the title of the lords of the manor, and if the latter really had title they might then have brought their ejectment, to support which no notice to quit would have been necessary. It is true that the lords of the manor have been permitted to take the tithe of oats: but that permission only continued because the incumbents did not know under what title the lords of the manor claimed the tithe; and at any rate was a permission by the incumbents in their character of parsons and not in their character of tenants. It would have been a very different case had it been in evidence that the incumbents knew that they had the common law right to the tithe of oats; and that the lords of the manor could not claim it except as a render for the lands in question. The mere taking of the tithe is not sufficient to defeat the adverse possession, unless it has been taken *eo intuitu* as rent. Indeed it appears that the incumbents refused to permit the lords of the manor to take that which was expressly reserved as the rent; it is therefore to be presumed that they were suffered by the incumbents to take the tithe of oats un-

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der the apprehension that they were entitled to them in some other right than that which grew out of the lease, and probably the confusion arose from the circumstance of their being portionists of the tithe together with the rector. Besides, the grant of the tithe of oats is perfectly distinct from the reservation of the rent; and although it is provided that the lords of the manor shall have a right to enter upon the land in case of their being disturbed in taking the tithe, yet it does not follow that the tenure of the land depends on the incumbents suffering the lords of the manor to take the tithe. It does not lie on the Defendant to make out a strong case of adverse possession, but on the Plaintiff to establish his own title clearly and satisfactorily.

LORD ALVANLEY Ch. J. If the rules of law will permit me to do otherwise, I shall be very sorry to give any countenance to the defence which has been resorted to in the present case. And the more so, because the two parties in ascertaining their respective rights meet upon very unequal terms; the one as the representative of the church, being barred by no lapse of time in the claim of any dormant rights, whereas the other has to encounter the difficulties opposed to him by the statute of limitations. It is not disputed that the premises in question were demised to the rectors of *Beddington* by the predecessors of the present lessors of the Plaintiffs, reserving to themselves certain rents, and also the tithe of oats within the parish. Since the year 1753 the rectors have ceased to pay the rents reserved in the lease, but the *Carew* family have continued to receive the tithe. Possibly therefore at the time at which the rents were withheld, it was agreed between the then rector and the representative of the *Carew* family, that if the latter were permitted to receive the tithe as before, the former should be permitted to retain the land demised. Considering therefore that this is a question to be submitted to a jury, and understanding from the learned Judge who tried the cause that whatever was contested at the trial was submitted by him to the jury, I am of opinion that the present verdict ought not to be disturbed.

HEATH J. The doctrine of remitter furnishes a strong analogy in favour of the present lessors of the Plaintiffs; for the rule is that a man who is in by a *puisné* estate shall be remitted without any act of his own, but by mere operation of law to his

eigné estate (a). Now that rule seems to me very applicable to the present case, for it is clear that the *Carew* family continued to receive the tithe of oats, and therefore should, as it appears to me, be held to have received them in that right which they acquired under the demise by which they granted the premises in question. Besides it is to be recollected that this question arises upon the statute of limitations, which always receives a strict construction from the Courts.

ROOKE J. It is clear that the *Carew* family and the rectors of *Beddington* agreed to create the relation of landlord and tenant between themselves by the lease of 1703, and up to the present time the one has continued to receive the tithe and the other to hold the land. The present rector attempts to avail himself of a rule of law highly favourable to the church, by which he may without any limitation of time reclaim the tithe granted as a consideration for the enjoyment of the land in question by his predecessor, and yet prevent the *Carew* family from reclaiming their land by setting up the statute of limitations in bar of their demand. This is so unjust that I shall be glad to find out any ground upon which we may be enabled to defeat his attempt. Now it does appear to me that the former rectors of the parish may be presumed to have intended to do justice, and therefore to have permitted the *Carew* family to receive the tithe of oats by way of compensation for the land which they continued to hold. If so, the present rector not having succeeded to the living till 1782, the possession of the premises in question was not adverse up to that period, and since that period 20 years have not elapsed. Upon the whole therefore I think there ought not to be a new trial.

CHAMBRE J. Upon this question I have entertained considerable doubts; nor indeed is my mind altogether free from doubts at the present moment. Those doubts do not respect the justice of the case, for that is most clearly with the lessors of the Plaintiff.

(a) With respect to this analogy however it is to be observed, that remitter never operates to revert a tortious freehold, in order to revert a rightful term for years; the latter title being of no esteem in the law. 2 Roll. Abr. tit. Remitter, F. fo. 420. l. 35. Com. Dig. tit. Remitter, c. 7. But the right to the tithe claimed by the *Carew* family as portionists was a freehold, whereas the right derived under the lease was but a right to take from year to year, arising out of the implied *assumpsit* which resulted from the

Defendant holding over the lands in question after the expiration of the lease. It may further be observed, that as the *Carew* family never had been out of possession of the tithe from the time when the lease was granted to the time when the Defendant was instituted to the rectory, if any right to the tithe under the implied *assumpsit* remained in them at this latter period, the right and the possession never having been separated, the estate was complete without the operation of remitter.

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I am not indeed altogether without suspicion that the contract entered into between the rectors of *Beddington* and the *Carew* family originated in simony; the latter reserving to themselves much more than they were entitled to under the name of a compensation for the manor house and lands. But however that may be; it will not affect the present question. If this case were to be again submitted to a jury, I think they might fairly conclude that in 1753 the then rector of *Beddington* quarrelled with the terms of his lease, and though he refused to continue the stipulated renders to the *Carew* family, yet permitted them to receive the tithe of oats. Possibly at the trial the question was not put to the jury quite so fully as it might have been, but reserved rather too much as a dry point of law. Indeed could I be convinced that the jury had considered and decided the precise question, my doubts would be removed. Certainly in the litigation of their respective rights, these parties contend on very unequal terms; the rector availing himself of a maxim of law in favour of the church to which the *Carew* family as laymen cannot resort. The point however which in this case has most embarrassed my mind, is the degree of positive proof drawn from the answer in Chancery of the lessors of the plaintiff in their own favour. It is true that it was introduced into the cause by the Defendant, on whose behalf some parts of the answer were read. But in those parts on which the lessors of the plaintiff relied, they speak only to what they "have heard as truth." I think that was not admissible evidence, for it appears to me that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery (a). This point does not indeed appear to have been

(a) But all the cases agree that where part of an answer is read against a party he may insist on having the whole read, *Lynch v. Clarke*, 3 Salk. 154. per Holt Ch. J. or at least on reading the remainder himself. The *Earl of Bath v. Barbersea*, 5 Mod. 9. *Gilb. Law of Ev.* 51 Ed. 3. unless the part read be merely to shew the incompetency of a witness as interested in the event of the cause, *Sparin' v. Drax*, Mich. 27 Car. 2. *Bull. N. P.* 238, 2d ed. An answer indeed being treated as the admission of the party

against whom it is read, it does seem reasonable that the whole admission should be read to the jury for the purpose of shewing under what impressions that admission was made, though some parts of it be only stated upon *hearsay* and *belief*. But whether the party against whom the answer is read be entitled to have such parts of it as are not expressly sworn to left to the jury as evidence (however slight) of any fact, does not appear to have been hitherto decided.

contested at the trial. Had it been contested I should have thought the Court bound to send the case down to a new trial. Upon the whole however, I am disposed to concur with my Lord and my brothers, that there ought not to be a new trial in this case.

Rule discharged.

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MARSHALL Serjt. shewed cause against a rule for pleading several matters to a declaration in trespass for taking goods; the pleas were, 1st, not guilty; and, 2dly and 3dly, two special justifications under two of the acts of Parliament respecting bankrupts; he stated that this was an action directed by the Lord Chancellor to try a question of bankruptcy, and that therefore the plea of not guilty, putting in issue the taking of the property, would only hamper the plaintiff at the trial, and prevent the parties from litigating the real subject of the issue.

In an action of trespass directed by the Lord Chancellor to try a question of bankruptcy, the Court of C. B. will not restrain the Defendant from pleading the general issue together with special justifications.

Best Serjt. in support of the rule insisted, that as the pleas were not inconsistent, the Court would not interpose.

Lord ALVANLEY Ch. J. seemed to think that the Court ought to restrain the Defendant from pleading a plea which would tend to embarrass the trial of the only question which the Lord Chancellor wished to have tried.

But the rest of the Court were of opinion that as the pleas were not inconsistent, the Defendant ought to be permitted to plead them, and the Plaintiff ought to apply to the Lord Chancellor to prevent the Defendant from taking advantage at the trial of any thing which went to shut out the real point at issue.

Rule absolute (a).

(a) Vide *Shaw v. Everett*, ante, vol. 1. | *Lechmere v. Rice*, ante, p. 12. and *Thyatt v. Young*, ante, p. 72.
p. 222. *Angerstein v. Vaughan*, *ibid.* in notis.

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Where money is paid into Court generally upon a declaration in contract, it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties. Therefore where a Defendant who had possessed himself of goods belonging to the Plaintiff, and had sold part and kept the residue in specie, paid money into Court generally upon a declaration containing a count for goods sold and delivered, it was held that he had thereby admitted the transaction to have been converted into a contract, and that the Plaintiff was entitled to recover the value of all the goods under the count for goods sold and deliver-

ASSUMPSIT for goods sold and delivered, money lent and advanced, money paid, money had and received, and on an account stated. The Defendant pleaded generally to the declaration, 1st, *non assumpsit* as to all except 4*l.* 3*s.*, upon which plea issue was joined; 2dly, a tender of the said 4*l.* 3*s.*, and paid this sum into Court generally. The Plaintiff admitted the tender and took the money out of Court.

The cause was tried before *Chambre J.* at the *Guildhall* Sittings after last *Easter* Term, when it appeared that the action was brought to recover the value of four out of six hides belonging to the Plaintiff, which had come to the hands of the Defendant. Two out of the six hides had been returned by the Defendant; one had been sold by him for 1*l.* 12*s.* but the money had not been paid over to the Plaintiff; and the three others remained in the Defendant's possession. The Plaintiff conceiving himself entitled to the value of all the hides, sent in a bill of parcels to the Defendant, in which he charged for the four which had not been restored to him as follows: "One hide at 2*l.* 10*s.*; two ditto 3*l.*; " one ditto 1*l.* 12*s.*, total 7*l.* 2*s.*" The Defendant did not dispute the Plaintiff's right to the value of one hide which had been sold, but claimed the other three as his own. The Jury being satisfied that all the six hides belonged to the Plaintiff, gave him a verdict for 2*l.* 19*s.*, which, together with the 4*l.* 3*s.* paid into Court, made up the value of the four hides for which the Plaintiff had not received any thing. The learned Judge in making his report observed, that the 4*l.* 3*s.* tendered and paid into Court was more than the value of the single hide which had been sold by the Defendant, and for which the money had not been paid over, and that indeed it did not precisely appear to what it was intended to be applied. Leave was given to the Defendant to move to enter a nonsuit, if the Court should be of opinion that the Plaintiff could not recover in this action. Accordingly a rule *nisi* for this purpose having been obtained on a former day,

Best Serjt. now shewed cause. In a case of this kind, though a tort may have been committed by the Defendant, yet the Plaintiff is at liberty to wave the tort and bring his action as upon a

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contract. The value of the goods being proved, and the receipt of them by the Defendant, it cannot be permitted to the latter to say that he obtained them wrongfully in order to avoid the contract by virtue of which the Plaintiff alleges him to have received them. In support of this proposition may be cited *Feltham v. Terry*, cit. *Cowp.* 415, 416. 419. and 1 *Term Rep.* 387. where goods having been taken and sold under an execution upon a conviction which was afterwards quashed, the Plaintiff was allowed to maintain an action for money had and received, though a trespass had been committed. So Lord *Mansfield* in *Hambly v. Trott*, *Cowp.* 375. when speaking of the actions which are maintainable against an executor, seems to hold the same doctrine; he says, "in most if not in all the cases where trover lies against the testator another action may be brought against the executor which would answer the same purpose." Indeed he observes, that an action on the custom of the realm against a common carrier is for a tort and supposed crime, yet *assumpsit*, which is another action for the same cause, will lie; and that if a man take a horse from another and bring him back again, though trespass will lie against him, yet an action for the use and hire of the horse will lie against his executor. Though Mr. Justice *Buller*, in *Birch v. Wright*, 1 *Term Rep.* 385. seemed to doubt the authority of a case there cited as decided at the *Launceston* Assizes, when Mr. Justice *Gould* was at the Bar, in which it was held that use and occupation might be maintained for the value of premises held after the time of the demise laid in an ejectment tried at the same Assizes, yet he expressly recognized the authority of *Feltham v. Terry* as deciding that the tort might be waived and an action maintained for the money due. It is true that in *Lindon v. Hooper*, *Cowp.* 414. where the Plaintiff had paid money for the release of his cattle which had been wrongfully distrained, the Court held that he could not maintain an action for money had and received, but that trespass or replevin was the proper remedy. But the ground of that decision was, that the Defendant would be laid under great difficulty by the form of action adopted by the Plaintiff, since he could not be prepared to make his defence unless the Plaintiff's right was stated upon record, which it would be in trespass or replevin. But the same objection does not apply to the present case, where the Defendant learns nothing more of the Plaintiff's right from the pleadings in trover than he does from the pleadings in *assumpsit*. And indeed the Defendant in the latter

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form of action is entitled to an advantage, *viz.* that of a set-off, of which he could not avail himself in the former. At any rate, however, the payment of money into Court amounts to an admission on the part of the Defendant that the transaction between the parties, though originally a tort, had been converted into a contract: it is therefore no longer competent to the Defendant to object to the form of the action. It was contended at the trial that the money paid into Court could only apply to the money actually received by the Defendant: but in answer to this it may be observed, that the Defendant has paid into Court 4*l.* 3*s.*, whereas if he had intended to confine his payment to the transaction respecting the money received, he would only have paid in the exact sum received, *viz.* 1*l.* 12*s.*, and would have specifically applied the payment to the count for money had and received. In *Burrough v. Skinner*, 5 *Burr.* 2639. which was an action brought by a purchaser to recover back the deposit from an auctioneer in consequence of an objection to the title, the question was, whether the auctioneer was liable, and the Court held that having paid money into Court he had acknowledged himself liable to the action. So in *Watkins v. Towers*, 2 *Term Rep.* 275. it was held, that giving evidence of a rule of *K. B.* for payment of money into Court was a sufficient compliance with an undertaking, to give evidence of some matters in issue arising in *Middlesex*; because it admitted the cause of action and superseded the necessity of all that proof which the Defendant must otherwise have given. Lord *Kenyon* likewise, in *Baillie v. Cazalet*, 4 *Term Rep.* 579. says, “where a Defendant pays money into Court on some of the counts only, it is saying in other terms, that he admits the Plaintiff has a cause of action against him to a certain extent, but that he means to defend himself against the charges contained in the other counts;” from which it may be inferred that if the money had been paid in generally, his Lordship would have considered it as an admission of a cause of action on all the counts. Indeed in *Gutteridge v. Smith*, 2 *H. Bl.* 374. it was expressly decided that payment of money into Court generally in an action on a bill of exchange dispensed with the necessity of proving the handwriting of the drawer. It is true that payment of money into Court does not admit an illegal demand beyond the sum actually paid in, *Cox v. Parry*, 1 *Term Rep.* 464.; and that if part of the Plaintiff’s demand be legal and part illegal, the Court will not allow the money paid in to be applied

to the illegal part, *Ribbons v. Crickett*, ante, vol. 1. p. 264. But these two latter cases will not affect this case, where the objection is not to the legality of the demand, but merely to the form of the action.

Vaughan Serjt. contra, was desired by the Court to confine himself to the last point.—Payment of money into Court admits a cause of action to the extent of the money paid in, and no further. This position is expressly established by the case of *Cox v. Parry*: and in *Gutteridge v. Smith*, *Eyre Ch. J.* says, that on the authorities there is nothing to shew that the cause is not in all material respects in the same situation after payment of money into Court as before. With respect to the case of *Burrough v. Skinner*, the only question which there arose was this, Whether the Defendant or some other person were liable on the Plaintiff's demand? and the Court thought that the Defendant, by paying something into Court, had acknowledged himself to be the person liable: but no objection to the nature of the demand was raised: and the case of *Watkins v. Towers* only goes the length of shewing that payment of money into Court is an admission that something is due on the contract stated in the declaration, but does not decide that it amounts to any admission of the contract beyond the sum paid. If the doctrine contended for on the other side were to be admitted, this absurd consequence would follow, that in an action upon contract where money has been paid into Court generally, the Plaintiff would be at liberty to give in evidence every species of injury upon which he might be entitled to receive a compensation from the Defendant, though it should consist of a trespass or even an assault, and the Defendant would be precluded from objecting by his supposed admission that the cause of action was not a tort but a contract. With respect to the amount of the sum paid into Court in the present case, there can be no reason for supposing that it was not intended to be applied to the money actually received by the Defendant, since it is always usual for Defendants on similar occasions to pay in rather more than is really due.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY Ch. J. who after stating the case, proceeded as follows: At the trial it was contended for the Plaintiff, that he was at liberty to give in evidence, in order to increase the damages beyond 4*l.* 3*s.* not only the value of the skin which had been sold,
and

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and for which the money had been received by the Defendant, but also, as on a contract for goods sold and delivered, the value of the skins which still remained in the Defendant's possession. On the other hand, the Defendant insisted that he was not at liberty to give in evidence the value of these last skins on a count for goods sold and delivered, since nothing had passed between the parties reducing the transaction into a contract of that sort; and that as to those skins the Plaintiff could only proceed in trover. The learned Judge however admitted the evidence, reserving the point for the consideration of this Court; and the only question now is, Whether, as the case stood at the time of the trial, the Judge did right in admitting the evidence upon this count for goods sold and delivered? When the case came on before this Court, a wide field of argument was entered into on this question, namely, whether in all cases where a party has converted goods of another to his own use, it is competent to the Plaintiff to change the transaction into a contract for goods sold and delivered? we thought it right to stop the counsel for the Defendant, being of opinion that the case would not turn on that point: and I do not now intend to give any positive opinion upon it. But thus far I will say, that it does appear to me monstrous to carry the cases to any such extent as that which has been contended for, and that they do not warrant the conclusion which has been drawn from them. The cases cited were *Hambly v. Trott*, *Lindon v. Hooper*, and *Feltham v. Terry*. Lord Mansfield, in the case of *Hambly v. Trott*, confines the doctrine to the case of money had and received; and I do not find that the Judges in any of the cases have gone so far as to hold that a tort may, at the option of the Plaintiff only, be converted into a contract. In the case of money had and received, where nothing more than the money actually received can be recovered, no injury can arise to the Defendant: and indeed he derives some advantage, since he becomes entitled to avail himself of a set-off. But where any inconvenience may arise to the Defendant, the Court will not allow the principle to be extended, even in the case of money had and received; and therefore in the case of *Lindon v. Hooper*, where the Plaintiff had paid money for the release of his cattle, which had been distrained by the Defendant for damage feasant, the Court refused to allow the former to maintain an action for money had and received. All that is to be collected from the cases is this, that if the goods be converted into money, the Court will allow the

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the Plaintiff to wave the tort and bring an action, in which he can recover nothing more than the sum actually received. But if it were competent to the Plaintiff in a case like this to wave the tort, and convert the transaction into a contract, it might involve the Defendant in great difficulties. Goods are demanded of a person who claims them as his own, and insists on keeping them. Now if the party demanding the goods be at liberty to convert this into a contract for goods sold and delivered, the consequence would be, that on proving his property in the goods the other party would be obliged to pay the value of them, though possibly to his utter ruin: whereas if the former had declared in trover, nominal damages only would probably be given, and the goods would be restored (a). For these reasons, it is my private opinion, and I believe that the rest of the Court agree with me on this head, that the general proposition contended for on the part of the Plaintiff cannot be supported. But although it be true that the Plaintiff cannot at his option alone convert this transaction into a contract for goods sold and delivered, yet it was hardly contended but that by consent of both parties it might be converted into such a contract. If goods be demanded by the Plaintiff, upon which the Defendant refuses to give them up, but says that if the Plaintiff will prove his property in them, he the Defendant will pay for them, that will turn the tort into a contract. And the question therefore is, Whether payment of money into Court on a declaration in contract, does not amount to a consent upon the part of the Defendant that the transaction shall be treated as a contract? and we are of opinion that it does. With respect to the effect of paying money into Court, several modern cases have been cited. In *Cox v. Parry*, the Plaintiff would have been entitled to recover nothing if the Defendant had not paid money into Court, the policy being illegal: but Mr. J. *Asbburß* observed, that the Defendant having paid money into Court he had thereby admitted that the Plaintiffs were entitled to maintain their action on the policy to the amount of the sum paid in. And in *Baillie v. Cazalot* Lord *Kenyon* says, “where a Defendant pays money into Court on some of the counts only, it is saying in other terms that he admits that the Plaintiff has a cause of action against him to a certain extent: but that he means to defend himself against the charges contained in

(a) See 1 *E/p. N. P.* 597.

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the other counts." Now from these words I collect the opinion of Lord *Kenyon*, that the payment of money into Court is an admission of a cause of action on every count, in every case in which a cause of action in its nature applicable to any of the counts can exist: we are not therefore obliged to admit the absurd consequence that evidence may be received of trespass or battery, for such transactions are not capable in their nature of being converted into a contract. In the case of *Watkins v. Towers*, Mr. Justice *Asbhurst* and Mr. Justice *Grose* were of opinion, that evidence of payment of money into Court was a compliance with the rule to give material evidence, because it amounted to an admission of the contract in the declaration. It is true that in *Gutteridge v. Smith*, Lord Chief Justice *Eyre* does throw out some doubts respecting the effect of paying money into Court, but my brothers *Heath* and *Rooke* were of opinion that it amounted to such an admission of the validity of the bill there declared upon as to preclude the necessity of proving the handwriting of the drawer. It is also observable, that in the case of *Ribbans v. Crickett*, which was posterior to that of *Gutteridge v. Smith*, Lord Chief Justice *Eyre* in giving the opinion of the Court that money paid into Court could not be applied to an illegal demand, does admit that it amounts to an acknowledgment of any legal demand which according to the nature of the declaration the Plaintiff could have on the Defendant. Then without carrying the effect of payment of money into Court to the extravagant length which has been objected to, we are of opinion that such a payment on the whole declaration, is an admission of a contract on every count, in every transaction upon which such a contract can arise. Let us however consider whether the Defendant had sufficient notice of the transaction for which the action was brought: for certainly we would not suffer him to be entrapped. Here the declaration was for goods sold and delivered, and for money had and received: and it may be said that it does not specify the transaction in question. But it may be observed, that by the modern practice of the Court, if the Defendant be at a loss to ascertain the cause of the Plaintiff's demand, he may apply for a bill of particulars. The Defendant here must have known that he had made no contract with the Plaintiff except what might arise out of the transaction relating to the skins. If he had applied for a bill of particulars he would have been informed that the Plaintiff meant to charge for the value of the skins not sold, and the money received on account of

that which was sold. But he, chose to pay money into Court generally. If therefore at the trial any evidence were given from which a contract under any circumstances might arise, it was competent to the Plaintiff to insist that the Defendant had admitted such a contract. I mean therefore to be understood to say, that although an action of trover cannot at the option of the Plaintiff only be converted into an action for goods sold and delivered, yet that an action for goods in the custody of the Defendant, may by contract be converted into an action for goods sold and delivered: and that under the circumstances of this case it was competent to the Plaintiff to give in evidence the payment of money into Court by the Defendant, as evidence that the transaction between the parties had been converted into a contract; which reduced the dispute to a mere question, whether sufficient had been paid to cover the value of the skins unsold and the money received upon that which had been sold. We are therefore of opinion that in this case there ought not to be a nonsuit.

Per Curiam,

Rule discharged (a).

(a) So if a Plaintiff declare against a carrier upon a contract to carry certain goods safely, and the carrier pay 5*l.* into Court, he will not be at liberty to give in evidence a notice by which he declares that he will not be liable for any loss beyond 5*l.*, for

by paying money into Court he has admitted the contract as stated, and shall not be at liberty to set up any exception to it, but must pay so much as the damage sustained by the Plaintiff actually amounts to. *Tate v. William*, 2 *East*. 128.

CATOR v. HOSTE.

Nov. 24th.

THIS was an application calling on the Plaintiff to shew cause why the bond and warrant of attorney, and all other securities of an annuity granted by the Defendant to the Plaintiff should not be delivered up to be cancelled, and why a sum of money levied under an execution in this cause should not be restored to the Plaintiff, and all further proceedings be stayed. The objection to the annuity arose from the mode in which an agreement for a power of redemption had been memorialized. From the affidavits in support of the application it appeared that the annuity had been

At the time of executing an annuity deed, one R. W. the agent of J. C. the grantee entered into an agreement for redemption, beginning thus, "Memorandum, I undertake and agree," &c. and concluding,

"Witness my hand, R. W. agent for J. C." The memorial stated that J. C. entered into the agreement by R. W. his agent, and that it was witnessed by R. W. Held that the memorandum was sufficient.

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purchased and the consideration money paid by one *R. Woodgate* as agent for the Plaintiff at the time of the execution of the securities by the Defendant, *Woodgate* alone being present and attesting the deeds, and that an agreement was entered into at that period in the following terms: "Memorandum, I undertake and agree that "in case the said *D. Hoste* of, &c. shall be desirous of repurchasing "the annuity granted by him for his life to *J. Cator* of, &c." (it then proceeded to set out the terms on which the redemption was to be effected, and concluded); "witness my hand this 30th day "of *September 1795. R. Woodgate, agent for J. Cator Esquire.*" The manner in which this clause was noticed in the memorial was as follows: "And also of a memorandum, bearing date the 30th "day of *September 1795*, whereby the said *J. Cator*, by *R. Woodgate* his agent, undertook and agreed, that in case the said *D. Hoste* should be desirous of repurchasing the annuity," &c. (setting out the terms as in the memorandum, and concluding) "or "the said memorandum was to such purport or effect; and which "said memorandum is witnessed by the said *R. Woodgate.*" Hence it was objected that the agreement was not truly set forth in the memorial, it being there described to be an agreement and undertaking by the Plaintiff, whereas it was an agreement and undertaking by *R. Woodgate*, and though said to be witnessed by him, was in fact signed by him not as a witness but as the contracting party.

Best Serjt. now shewed cause and argued that the agreement was in substance truly memorialized, inasmuch as *Woodgate*, though the contracting party, contracted on the behalf of his principal, not on his own behalf; and that it was not necessary that the agreement should have been witnessed at all.

Praed Serjt. in support of the application contended, that it was not sufficient to state the substance of the agreement in the memorial, but that the form also must be pursued; that it had been considered by the Court that the object of the annuity act was to prevent men from entering into such improvident engagements, and therefore was construed strictly in support of applications like the present, *Ex parte Ansell, ante*, vol. 1. p. 64.; that in this case *Woodgate* and not *Cator* was the contracting party, the grantor possibly having preferred the undertaking of the former; that the true statement of mere formal matters had been required by the Courts, as for instance the precise manner in which the

consideration money had been paid (a), and the precise hand by which it had been paid (b).

LORD ALVANLEY Ch. J. I do not think the objection to this annuity can possibly prevail, notwithstanding the rigorous extent to which the provisions of the annuity act have been carried. Whatever my opinion might have been originally, I must now acquiesce in the determination that the hand by which the consideration money is paid must be stated. But that statement is not mere matter of form, for the reason upon which that decision proceeded was that the Court, by having before them all the *dramatis personæ*, might be able to ascertain all the particulars of the transaction. Indeed according to the letter of the act, such a statement does not appear necessary. Undoubtedly a clause of redemption must be truly stated; because it is part of the consideration of the annuity. But it does appear to me that the memorial in the present case has very truly stated the agreement for redemption. What was the present transaction? *Woodgate* as agent for *Cator* signs the contract for the annuity, and then enters into the agreement for the repurchase of the annuity on which the present question turns. He must therefore be taken to have entered into the agreement as agent only for *Cator*, and the agreement must be considered as substantially *Cator's* and not *Woodgate's*. The former only is liable on this undertaking and not the latter. With respect to the observation that it is said to be signed by *Woodgate* as a witness, when in fact it was signed by him as an agent, the answer is that it was not necessary that it should be witnessed.

HEATH and ROOKE Js. expressed themselves of the same opinion.

CHAMBRE J. The names of the witnesses are required to be stated, in order that evidence of the transaction may at any time be obtained. But that reason does not apply to this case, where the only person present is stated in the memorial, but whether present as witness or agent is the single point in dispute. If indeed this mode of memorialising the agreement had a tendency to mislead, that might be a ground for the application, but we

(a) *Rumball v. Murray*, 3 Term Rep. 298. See also *Ex parte Fallon et Ux.* 5 Term Rep. 283. and *Kelfe v. Ambrosse*, 7 Term Rep. 551. and *Giasse v. Mount*, ib. 390. But this rule applies to the deed only, not to the memorial, per Eyre, Ch. J. *Ex parte Ansell*, ante, vol. 1, p. 63. note a

(b) *Dalmer v. Barnard*, 7 Term Rep. 248.

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ought to extend the rules adopted with respect to memorials no further than justice requires.

Rule discharged.

Nov. 24th. **WHEELER** Demandant, **HILL** Tenant, and **HESELTINE** and Others Vouchees.

Amendment of a recovery by inserting a new parish in the writ of entry, on affidavit of the original intent of the parties to include all their property within the county, and of the assent of all persons interested at the time of the amendment.

WILLIAMS Serjt. moved to amend a common recovery by inserting in the writ of entry "the parish of *Charles*." The recovery was suffered in *Hilary* Term, 25 *Geo.* 3. of lands in the parish of *St. Andrew*, in the county of *Devon*, by the tenant in tail, with reversion to himself in fee. The deeds to lead the uses conveyed "all those two fields or closes of land called '*Sherwell's Fields*,' in the parish of *St. Andrew* in *Plymouth*; in the county of *Devon*, and all other the hereditaments wherein *M. T.* was seised, of any estate of inheritance in *Plymouth* or elsewhere in the county of *Devon*." After the recovery had been suffered it was discovered that the closes called "*Sherwell's Fields*" were situate in the parish of *Charles* in *Plymouth*, and not in *St. Andrew*. It was now stated by affidavit to have been the intention of all the parties to the recovery that all the estates of *M. T.* situate in the county of *Devon*, should be included therein, and that all the issue of the tenant in tail were of age and consented to the present application. He cited *Watson v. Cox*, 2 *Bl.* 1065.

Lord **ALVANLEY** Ch. J. hesitated much in acceding to the application, and said that he would not have concurred in the amendment if all the parties whose interests might be affected had not assented to it.

Per Curiam,

Amendment allowed (a).

(a) Vid. *Croft v. Pead*, ante, vol. 1. p. 137. and the notes to that case.

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STOVIN One, &c. v. PERRING and Another, Sheriffs
of London. Nov. 24th.

ACTION on the case.

The first count of the declaration stated that one *John Pugh* being indebted to the Plaintiff for work and labour, the Plaintiff sued and prosecuted out of *the Court of our Lord the King of Common Bench*, a writ of attachment of privilege, directed to the Defendants as Sheriffs of *London*, whereby they were commanded that they should attach the said *John Pugh* and have him before *the King's Justices at Westminster* on *Saturday* next after eight days of *St. Hilary*, to answer, &c.; that the writ was duly indorsed for bail and delivered to the Defendants, who did arrest the said *John Pugh*, but that the Defendants afterwards suffered the said *John* to escape; and that the Defendants so being Sheriffs of *London* as aforesaid had not the body of the said *John* before our said Lord the King upon or at the day mentioned in the said writ, and so thereby appointed for the return thereof as aforesaid, according to the exigency of the said writ, and the rules and practice of the said Court of our said Lord the King of Common Bench on that behalf.

In an action against the Sheriff for an escape on mesne process, it is sufficient to aver that the Sheriff had not the body at the return of the writ, without negating the appearance of the party or his putting in bail.

If the writ issue from C. B. and the declaration for an escape aver that the Defendant "had not the body before our said Lord the King" on the return day, it is bail on special demurrer.

The second count, after stating the delivery of the writ to the Defendants as in the first count, averred that the said *John Pugh* after such delivery, and before the return of the said writ, to wit, on, &c. and on divers other days and times between that day and the return day of the writ, was within the bailiwick of the Defendants, and might and could at any or either of those days and times have been arrested. Yet that the Defendants did not, nor would at any or either of those days or times, or at any other time whatsoever before the return of the last mentioned writ, take or arrest the said *John* at the suit of the Plaintiff, under and by virtue of the said last-mentioned writ, but wholly refused and neglected so to do, neither had they the body of the said *John* before the Justices of the said Lord the King of the *Common Bench* upon or at the day mentioned in the said last-mentioned writ, and thereby appointed for the return thereof according to the exigency of the said last-mentioned writ, and the rules and practice of the said Court of the said Lord the King of *Common Bench* in that be-

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half, but so to do wholly neglected and omitted, and therein failed and made default, to wit, at, &c. by means whereof the Plaintiff was delayed in the recovery of his debt.

To this declaration there was a special demurrer assigning for causes "that it is not stated or alleged in or by the said first count of the said declaration, that the said Defendants as such Sheriffs of *London* had not the body of the said *John Pugh* before our said Lord the King's Justices at *Westminster* at the return of the said writ in that count mentioned, but only that they the said Defendants, so being Sheriffs of *London* as aforesaid, had not the body of the said *John* before our said Lord the King upon or at the day mentioned in the said writ in that count mentioned, which, inasmuch as the said writ in that count mentioned was issued out of and returnable in the Court of our Lord the King of the *Common Bench* at *Westminster*, they were not commanded or requested to do. And also that it is not stated in and by the said first count, nor in any other part of the said declaration, that the said *John Pugh* did not appear or put in bail to the said writ in that first count mentioned in the said Court of our Lord the King of the *Common Bench* at *Westminster* at the return of the said writ, according to the exigency thereof." And as to the last count "that it is not in or by that count of the said declaration, nor in any other part of the said declaration, stated or alleged that the said *John Pugh* did not appear or put in bail to the said writ, in the said last count mentioned, in the said Court of our Lord the King of the *Common Bench* at *Westminster* on the return of the said writ, according to the exigency thereof. And also that the said declaration is in various other respects uncertain, insufficient, and informal," &c.

Vaughan Serjt. having admitted, upon a question being put to him by the Court, that the first count was not maintainable,

Lens Serjt. was now called upon to support the objection to the second count. He contended that it was not sufficient for the Plaintiff to allege that the Sheriff had not the body at the return of the writ, without negating that the party appeared or put in bail, for that he might have voluntarily surrendered himself and put in bail without any arrest; and he cited *Hawkins v. Plomer*, 2 Bl. 1048. to shew that it is sufficient if the Defendant appear at the return of the writ, and that in actions for escape on mesne process the writ shall surmise that *ad largum ire permisit et non*

comperuit ad diem, though on process in execution *ad largum ire permittit*, is quite sufficient.

Vaughan Serjt. for the Plaintiff insisted that if the party appear and put in bail, it is a compliance with the writ and will negative the allegation that the Sheriff had not the body; for that if the Sheriff be ruled to bring in the body, putting in good bail satisfies the rule, *Wolfe v. Collingwood*, 1 Wils. 262. That with respect to the distinction between actions on mesne process and on process of execution, though it be not sufficient in the former case to say, *ad largum ire permittit*, yet it is not necessary to allege both that the Sheriff had not the body, and that the party did not appear at the day, which are synonymous allegations, though indeed it be necessary that one of them should be added; that the command of the writ is that the Sheriff have the body to answer, &c. and that it is therefore sufficient to allege a breach in the words of the writ.

LORD ALVANLEY Ch. J. I can entertain no doubt that the Plaintiff has alleged a sufficient breach of duty in the Sheriff to entitle himself to an action for the damage which has ensued. If the party had appeared at the return of the writ, the Sheriff would have had the body.

HEATH and ROOKE Js. concurred. }

CHAMBRE J. It seems to me to be sufficient in this case to follow the language of the writ; though I confess that I do not like to depart from the established forms of pleading (a) for which there often are reasons which do not at first occur. In the present instance however it does appear to me that the breach is sufficiently stated.

Judgment for the Plaintiff on the second count.

(a) In *Herne's Pleader*, p. 129. there is a precedent of a declaration in case for an escape, in which the allegation of the debtor's non-appearance on the return day is like the one adopted in the principal case, viz. "did suffer freely to go at large whether he would, and the said R. before the said Justices of the said King at Westminster aforesaid at the said morrow of All Souls, according to the effect of the said writ, he had not." But in *Toone v. Theobald*, Lill. Ent. 60. where the averment is that the Sheriff neglected to have the body on the

return day, it is followed by an allegation that the debtor "was not committed to the Marshal of the Marshalsea, nor put in any bail." The modern practice is to allege that the debtor did not appear according to the exigency of the writ; which single allegation negatives both his having put in bail, and that the Sheriff had his body. In this form are most of the MSS. precedents. See also *Wentw. Plead.* v. 8. p. 456; though in the same volume, p. 482. there is a precedent similar to the one adopted in the principal case.

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REDIT Gent. One, &c. v. BROOMHEAD.

An attorney's clerk, though not clerk to the Defendant's attorney, cannot become bail above.

THE bail in this case, being about to justify, were opposed by *Williams* Serjt. on the ground of one of the bail originally put in being clerk to an attorney, in whose room one of the now bail had been substituted, and notice given that the bail thus added would with the other original bail justify. He observed that the bail put in at first being a nullity, because one of them was clerk to an attorney, it was impossible to add any bail to what did not exist.

Bayley Serjt. *contra* insisted that the bail originally put in not being clerk to the attorney of the Defendant in the action, did not fall within the reason of the rule, which had been at first adopted with respect to attornies only, and subsequently extended to their clerks.

But *The Court* (not without much hesitation on the part of Lord *Alvanley* Ch. J.) finding the practice had been uniform (a) not to allow attornies clerks to become bail, rejected the bail; and *Heath*, *Rooke*, and *Chambre* Js. expressed themselves clearly of opinion that the rule was a very beneficial one, and had with reason been extended to all attornies' clerks.

(a) Vid. *Boulogne v. Vautrin*, Doug. 467. in notis. *Laing v. Cundall*, 1 H. Bl. 76. and *Cornish v. Ross*, 2 H. Bl. 350. Indeed the words of the rule Mich. 6 Geo. 2. on which the practice is founded, are very strong, viz. "no attorney of this or any other court, or

any person practising as such." Where any person within the prohibition of this rule is put in as bail, the Plaintiff may take an assignment of the bail bond, *Fenton v. Ruggles*, ante, vol. 1. p. 356. and *Wallace v. Arrow-smith*, ante, p. 49.

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ASSUMPSIT. The first count of the declaration stated " that heretofore and before the making of the agreement, promise, and undertaking hereinafter mentioned, to wit, on the 4th day of *May* 1793, at *Salisbury*, in the county of *Wilts*, the Defendant became and was tenant to the Plaintiff of a certain messuage and farm of the said Plaintiff, in the parish of *Handley*, in the county of *Dorset*, by virtue of a certain lease and demise thereof then and there made by the said Plaintiff to the said Defendant, for a certain term of years, to wit, for the term of 14 years then next following, wherein the said Defendant amongst other things covenanted with the said Plaintiff that he the said Defendant, his executors and administrators, should and would yearly and every year during the continuance of the said lease, fetch 75 bushels of coals from *Poole*, and all the peat, turf, and other fuel which the said Plaintiff should want to make use of, and deliver the same at his mansion-house *gratis*; and also should and would during the said term supply the said Plaintiff with as much good wheat as he should want to expend in his family at 5*s.* *per* bushel, and as much good barley and oats as he should want for his horses, pigs, and dogs at one guinea *per* quarter; that thereupon, afterwards and before the end and expiration of the term of 14 years above mentioned, and during the continuance of the lease aforesaid, to wit, on the 27th day of *May* 1796, at *Salisbury*, in the county of *Wilts* aforesaid, it was agreed mutually by and between the said Plaintiff and Defendant, that the lease so granted as aforesaid should be surrendered up and cancelled, and that the said Plaintiff should grant a new lease to the said Defendant for the term of twelve years, to commence from the then preceding 29th day of *September*, and which said new lease should not contain any covenant on the part and behalf of the said Defendant, his excutors, or administrators, to fetch

A. being tenant to *B.* under a lease containing covenants, by which the former was bound to fetch 75 bushels of coals from *Poole* yearly, and deliver them at the mansion-house of the latter, and also to supply him with as much good wheat as he should want in his family at five shillings *per* bushel; it was agreed between them that the lease should be surrendered up, and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into, whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-house of *B.* his heirs and assigns 75

bushels of coals yearly for 12 years (the term of the new lease), and yearly supply *B.* his heirs and assigns, with as much good wheat as he should want in his family at five shillings *per* bushel. *B.* having parted with his reversion in the farm, and also quitted the mansion-house in which he resided at the time when the agreement was made, held that he was not entitled to maintain an action against *A.* for refusing to deliver the wheat at the stipulated price; that the agreement being entire, must receive one uniform construction, and as it was clearly local in respect to the delivery of coals, it could not be deemed personal in respect to the wheat. Held also that no *parol* evidence could be admitted to explain the agreement, there being no latent ambiguity.

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yearly and every year during the continuance of the said new lease 75 bushels of coals, &c. (following the words of the former covenant); and that it was then and there further agreed by and between the said Defendant and the said Plaintiff, that the said Defendant and his executors should fetch and bring to the dwelling-house of the said Plaintiff, his heirs and assigns, 75 bushels of coals from *Poole* yearly and every year during the term of twelve years from the 29th day of *September* then last past, and all the peat, turf, and other fuel, and also supply him with wood for his fencing and hedging his lands *gratis*, when reasonably required, and also permit the said Plaintiff, his heirs and assigns to winter two rother beasts with straw in the backsides or straw bartons, with the milch cows belonging to said Defendant, his executors and administrators *gratis*, and permit and suffer the pigs to go out to stubble with the pigs of the said Defendant, his executors and administrators *gratis*; and also yearly and every year during the said term, supply the said Plaintiff, his heirs and assigns, with so much good wheat as he or they should want to expend in his or their family at 5*s.* *per* bushel, and also so much good barley and oats as he or they might want for his or their horses, pigs, and dogs, at 2*s.* 7½*d.* *per* bushel; and in failure of the performance thereof, or any part thereof, to pay to the said Plaintiff, his heirs and assigns, the sum of 100*l.* in lieu and satisfaction thereof; that in consideration that the Plaintiff promised the said Defendant to perform the said agreement in all things on his part to be performed, the Defendant promised to perform the same in all things on his part to be performed; that afterwards, to wit, on the same day and year last aforesaid, at, &c. the said first mentioned lease was surrendered up and cancelled, according to the said agreement; and that afterwards, to wit, on the same day and year last aforesaid, at, &c. he the said Plaintiff did execute a new lease to the said Defendant, according to the said agreement so made as aforesaid, and did do and perform all things in the said agreement contained on his part and behalf to be done and performed, to wit, at, &c.; yet the Defendant had not yearly from the said 29th of *September* to the suing out of the original writ of the Plaintiff, fetched and brought to the dwelling-house of the Plaintiff 75 bushels of coals from *Poole* aforesaid, &c. (negating the Defendant's performance of any of the terms of the agreement); by reason whereof, and according to the tenor of the said agreement, the

said Defendant became liable to pay to the Plaintiff the sum of 100*l.* when requested, &c.

The Defendant pleaded *Non assumpsit*.

The cause was tried before *Graham* Baron, at the last Summer Assizes at *Salisbury*, when it appeared that the first lease stated in the declaration was surrendered, and a new one granted in the manner therein mentioned, and that the agreement therein also mentioned was executed on the same day as the new lease; that the Plaintiff at the time when the new lease and agreement were executed, was possessed of two mansion-houses in the parish of *Handley*, one called *Stricklands*, the other called *Williams's*, in the former of which he then resided; but that he afterwards sold *Stricklands*, together with the reversion in the Defendant's farm, and from that time resided in *Williams's*; that from the time when the Plaintiff quitted *Stricklands*, the Defendant had omitted to perform the agreement, and that the action was brought to recover damages for such non-performance. The learned Judge was of opinion that the written agreement was to be considered independent of the lease, and that although such parts of the agreement as required a local delivery or local performance could not be enforced after the Plaintiff had quitted *Stricklands*, yet that as some parts of it did not require such local delivery or performance, the Plaintiff had still a right to insist upon the Defendant's compliance with those parts, though the latter was no longer tenant to the Plaintiff. He therefore directed the Jury to consider what damage the Plaintiff had sustained by the Defendant's refusal to supply him with a sack of wheat, which had been demanded, at the price mentioned in the agreement. The Jury found a verdict for the Plaintiff, damages 20 shillings.

A rule having been obtained calling on the Plaintiff to shew cause why this verdict should not be set aside, and a new trial be granted,

Best Serjt. shewed cause. It was agreed between the parties that the covenants of the old lease in favour of the landlord should be excepted out of the new lease, and the evident reason why this was done was, that the landlord being about to quit the premises on which he then resided, wished to make the undertaking of the tenant personal to himself, and thereby secure to himself those advantages which would otherwise have passed to his assignee. From the terms of the agreement it appears indeed that some of the co-

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venants were only to be performed while the Plaintiff resided in his then dwelling-house; but the stipulation respecting the wheat is not to be so restrained; for the agreement is general that the Defendant shall supply the Plaintiff with so much wheat at so much *per* quarter, which implies this provision, *viz.* if the Plaintiff shall demand the same of the Defendant, which demand must be made at the Defendant's residence. Nor is there any reason why the tenant should be relieved from such stipulation, for he of course has had a valuable consideration for it in the amount of his rent; and if the present Plaintiff cannot maintain this action the Defendant will be altogether discharged; for whether the Plaintiff or his assignee of the reversion be entitled to the benefit of the agreement, the action must be brought in the name of the Plaintiff.

Leas Serjt. contra was stopped by the Court.

LORD ALVANLEY Ch. J. I cannot construe this agreement in any other way than as referring to the relation of landlord and tenant subsisting between the parties, and that it was meant to continue between the Plaintiff and Defendant only so long as that relation should exist between them (*a*). The words "heirs and assigns" being introduced throughout clearly shew that it could not be intended as a mere personal agreement. Indeed many of

(*a*) But it should seem that if the Plaintiff had parted with his interest in the lands demised to the Defendant, or even with his estate in the mansion-house called *Stricklands*, but had continued to reside in the latter so as to be capable of deriving a benefit there from the performance of the agreement, he might have maintained his action. For where a parson covenanted with *R. B.* who was tenant by the curtesy to find a priest to perform divine service in the house of *R. B.* every *Saturday* in the year during the life of the said *R. B.* and afterwards *R. B.* surrendered his estate to the reversioner, and took back a term for years, it was held that the covenant was not extinct, and that *R. B.* might maintain an action for non-performance of the covenant, 6 *H. 4. 1. 1* Roll. Ab. Covenant O. pl. 1. fol. 522. 1 Bac. Ab. Covenant G. fo. 540. ed. 1736. 6 Vin. Ab. Covenant O. So where the covenant was to perform divine service in the chapel of *D.* not describing it as belonging to the manor, it was held

that the heir of the covenantee might maintain the action, though, in consequence of *mesne* alienations, he was not seised of the manor in his own right, but in that of his wife, for the covenant being personal descended upon the heir of the covenantee, and not upon the purchaser of the manor; but in that case it seems also to have been holden that if the chapel had been described as belonging to the manor, the heir after alienation could not maintain the action: nor even the alienee (adds *Broke*), as it should seem, for he is not privy in blood, 2 *H. 4. 6* Bro. Abr. tit. Covenant, pl. 17. Fitz. Abr. tit. Covenant, pl. 13. But this latter position of *Broke* is contradicted by 42 *Ed. 3. 3.* also abridged by *Broke*, tit. Covenant, pl. 5. There the covenant was to chaunt in the chapel of such a manor for the lords and their servants, and it was admitted that the purchaser of the manor might maintain an action on the covenant, though not privy as heir to the covenantee; for the covenant went with the land.

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the covenants are such as could not possibly be performed to any given assignee of the Plaintiff's living at any distance whatsoever from the demised premises, but only to such assignee as should succeed to the Plaintiff's dwelling-house at *Stricklands*, and stand in all respects in the same relation as the Plaintiff himself did at the time the agreement was entered into. It is observable ~~also~~ that these words "heirs and assigns" are used in the stipulation respecting the wheat as well as the other stipulations, and we must give one uniform and entire construction to the agreement, and not hold some parts of it to be personal and others not so. The parol evidence in this case cannot vary this construction. I am therefore of opinion that we are bound to consider the Defendant as having executed this agreement in the capacity of tenant to the person who should continue to sustain the character of landlord.

HEATH J. I am of the same opinion. In the first place, it appears to me that no parol evidence can be admitted unless there be a latent ambiguity in the agreement itself (*a*). It is contended, however, that the agreement itself is personal; but many of the stipulations in the agreement are clearly local, and not to be performed at a distance from the premises. The covenant to serve the Plaintiff's family, must mean his family in that place, and not wheresoever they may happen to reside.

ROOKE J. Had this agreement been reversed in its order, and the stipulations respecting the wheat been placed at the beginning, there might have been some ground for the Plaintiff's argument. But here the agreement begins with a provision that the Defendant shall bring coals to the Plaintiff's dwelling-house, and then goes on to stipulate that the Defendant shall furnish fuel and also wood for fencing his lands; then follow other provisions respecting the Plaintiff's cattle, and then the stipulation to supply the Plaintiff with as much wheat as he should want in his family. Now the meaning of the term family must be his family residing upon the premises. Every agreement must receive its construction from its own terms, without the introduction of any evidence *dehors* the agreement, unless there be some latent ambiguity.

CHAMBRE J. If there be any ambiguity respecting the particular articles mentioned in this agreement, we must look to the whole of the agreement in order to ascertain the sense of it. It is

(a) *Vide etiam Preston v. Merceau*, 2 Bl. 1249.

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admitted that some of the articles can only relate to the situation of landlord and tenant; but it is concluded that the stipulation respecting the wheat is to be separated from the rest, and to be construed as a personal agreement: but I find nothing in the language of the agreement which calls upon us to divide any part of it from the rest. The heirs and assigns mentioned in the agreement must either mean the heirs and assigns who should be entitled to the estate in lease to the Defendant, or the heirs and assigns who should be entitled to the house in which the Plaintiff resided: but in either of these cases the present Plaintiff would be precluded from maintaining his action.

Rule absolute.

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SLADE et Ux. Tenants v. DOWLAND Demandant; in
False Judgment.

If a demandant in a writ of right count upon the seisin of his ancestor *in dominico suo ut de feodo*, omitting *et de jure*, it seems to be bad.

If the demandant in deducing his title through a female, describe her as *sister and heir* of J. S. and it appear upon the face of the count that J. S. left a son who survived his aunt, it is fatal; although it also appear that upon failure of issue of the son, the issue of the sister of J. S. became his heirs.

WRIT of false judgment directed to the Sheriff of *Dorsetshire*, commanding him to go to the Court of the Manor and Forest Manor of *Gillingham*, and there cause to be recorded a plaint between the Plaintiffs and the Defendant of a plea of land, wherein the Plaintiffs complained that false judgment had been given. The Sheriff returned that he had recorded the plaint and set out the proceedings, *viz.* a writ of right close; and the count founded thereon, which was as follows: “*Thomas Dowland by Augustin John Maybew* his attorney, demands against *William Slade* and *Elizabeth* his wife, 18 acres of land, 18 acres of meadow, 18 acres of pasture, and 18 acres of furze and heath, with the appurtenances situate, lying and being in the tithing of *Bourton*, in the manor of *Gillingham*, in the county of *Dorset*, and within the jurisdiction of this Court, and whereof he says that *Thomas Gamlyn* was seised in his demesne as of fee, according to the custom of the manor aforesaid in the time of peace, in the time of the Lord *George* the second, late King of *Great Britain*, &c. and within sixty years now last past by taking the esplees thereof to the value, &c. and died thereof seised, leaving one *Elizabeth* his wife him surviving, and from the said *Thomas Gamlyn* the right to the said tenements, with the appurtenances, descended and came to one *William Gamlyn*, as brother and heir of the said *Thomas Gamlyn*, subject to

the estate of free bench of the said *Elizabeth* therein, according to the custom of the manor aforesaid, and from the same *William Gamlyn* the right to the said tenements, with the appurtenances, subject to the said estate of the said *Elizabeth Gamlyn*, descended and came to one *Hannah Dowland*, as eldest cousin and heir of the said *William Gamlyn*, according to the custom of the said manor, that is to say, as eldest daughter and heir of *Hannah Ball*, who was the only sister and heir of one other *Thomas Gamlyn*, who was the father as well of the said first mentioned *Thomas Gamlyn* as of the said *William Gamlyn*, which said *Elizabeth Gamlyn* died in the lifetime of the said *Hannah Dowland*; and from the said *Hannah Dowland* the right to the said tenements, with the appurtenances, descended and came to one *Thomas Dowland*, as son and heir of the said *Hannah Dowland*; and from the said *Thomas Dowland*, the son and heir of the said *Hannah Dowland*, the right to the said tenements, with the appurtenances, descended and came to the said *Thomas Dowland* the now demandant, as son and heir of the said *Thomas Dowland*, the son and heir of the said *Hannah Dowland*, and that this is his right, he the said *Thomas Dowland* the now demandant offers," &c.

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Several imparlances followed at the prayer of the tenants, and then a general demurrer; after which other imparlances at the prayer of the demandant, and a joinder in demurrer. Then came a judgment for default of the tenant's appearance, that the premises demanded should be taken into the hands of the lord of the manor; and a precept to the bailiff of the manor to take the same into the hands of the lord, and to make known the day of the caption at the next court, and summon the tenants to hear the judgment: at the next court the bailiff returned that the precept came to his hands too late for him to execute it before the next court; and therefore the same judgment was given, and precept awarded as before. At the next court the tenants again made default, and the bailiff returned that he had taken the premises into the hands of the lord, and that he had summoned the tenants to hear the judgment; whereupon judgment was given that the Demandant should recover his seisin of the tenements, with the appurtenances, against the tenants; and the demandant prayed a precept to the bailiff to cause him to have his full seisin thereof, which was granted, and at the following court the bailiff returned that he had caused the demandant to have full seisin. Upon this record the

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present Plaintiffs assigned errors thus: " And hereupon the said *William Slade* and *Elizabeth* his wife say, that the record aforesaid is vicious and in many respects defective, and that false judgment is given against them in the proceedings aforesaid in many instances, that is to say, in this, that is to say, that no seisin *of right* of the premises in the said count mentioned, is in the said count alleged and averred in *Thomas Gamlyn*, who is therein alleged to have been last seised, and from whom the said *Thomas Dowland* deduces his title, and that the right is in that count alleged to have descended to the several persons therein named in succession from the said *Thomas Gamlyn*, who for any thing which appears in the said count, had no right, and that the title is attempted to be deduced to the said *Thomas Dowland* from an ancestor who is not alleged to have any right, but for any thing which in the said count appears might have been seised of wrong, and the right have been in those who had been seised of and held the same premises since the death of the said *Thomas Gamlyn*, and that the right is stated to descend from one who no right had, and that the root of the said *Thomas Dowland*'s title is erroneously, imperfectly, and defectively alleged; and also in this, that supposing the said *Thomas Gamlyn* the last seised to have had any right, no right is deduced from the said *Thomas Gamlyn* to the said *Thomas Dowland*, inasmuch as the said *Hannab Dowland* is in the said count alleged to be the heir of the said *William Gamlyn*, and the right to the premises in the said count mentioned to have descended to the said *Hannab Dowland* as the heir of *Hannab Ball*, which said *Hannab Ball* must therefore have died before the said *William Gamlyn*, or the right have descended from the said *William Gamlyn* immediately to her the said *Hannab Dowland*, and yet the said *Hannab Ball* is in the said count stated to have been the sister and heir of *Thomas Gamlyn* the father, who must therefore have died in the lifetime of the said *Hannab Ball*, and to which said *Thomas Gamlyn* the father, *William Gamlyn* his son who survived the said *Hannab Ball* must have been heir, and to which said *Thomas Gamlyn* the father *Hannab Ball* never could have been heir, if it be true as is in the said count alleged, that the said *Hannab Dowland* was heir to *William Gamlyn* at the time of his death, and that the right descended immediately from him to her; and also in this, that no custom of the said manor is any where alleged, whereby it appears that eldest daughters and eldest female cousins are entitled to be heirs alone,

and

and exclusively of their younger sisters; and also in this, that judgment in the plea aforesaid is given for the said *Thomas Dowland* against the said *William Slade* and *Elizabeth* his wife, when by the law of the land judgment in the plea aforesaid ought to have been given for the said *William Slade* and *Elizabeth* his wife against the said *Thomas Dowland*; and also in this, that judgment is given in the plea aforesaid without any regard to the matter of law before the court on the proceedings, by the demurrer to the said count and joinder thereto; and so the said *William Slade* and *Elizabeth* his wife say, that in the said court of the said manor false judgment hath in divers instances been given against them upon the proceedings aforesaid, and they pray that the said judgment for the said defects, and for others in the said record appearing, may be reversed, annulled, and utterly made void, as being false and erroneous, and that the said *William Slade* and *Elizabeth* his wife may be restored to every thing which they have lost on occasion of the said judgment, and that the said Justices here may proceed to the examination of the said premises." The Defendant joined in error thus: "And the said *Thomas Dowland* says, that the judgment aforesaid ought not to be reversed, neither ought the said *William Slade* and *Elizabeth* his wife to be restored to any thing which they may have lost thereby, because he says that in the record aforesaid there is not any error, nor is any false judgment given in the said court of the said manor and forest manor, upon or in any of the proceedings aforesaid; and this the said *Thomas Dowland* is ready to verify, and he prays that the Court here may proceed to the examination of the premises aforesaid, and that the judgment aforesaid may be in all things affirmed, and adjudged good and sufficient to remain in its full force."

The case was argued on the last day of last *Trinity* Term; when *Williams* Serjt. for the Demandant was desired by the Court to begin. With respect to the first objection it is sufficient to state in the count that the party was seised in his demesne as of fee, without adding the words "and of right." Every seisin in fee implies a right to that seisin; and the court will not intend that the party came to his estate by disseisin. It is enough if it appear that the ancestor of the demandant was actually seised in fee simple, that being the only estate which can be recovered in a writ of right, *Fitz. N. B.* 1. 5. *Dally v. King*, 1 *H. Bl.* 1. Now in this case the demandant has alleged that his ancestor was seised in his

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demesne as of fee; which is a more apt way of pleading in the case of an estate in possession than, to say, "as of fee and right," which rather applies to an estate in reversion. Thus in *Wrottesley v. Adams*, *Plowd.* 187. *a.* the estate in fee simple in possession is described *in dominico suo ut de feodo*, but the fee simple expectant on an estate for years *ut de feodo et jure*, fo. 187. *b.*, and this distinction was approved by the Court, fo. 191. *a.* If however it be contended that the seisin in this case may have been obtained by wrong, it may be answered that in some cases such a seisin may be sufficient to maintain a writ of right, as appears from *Co. Litt.* 280. *b.* 281. *a.*; and if there be any case in which such a seisin will support the action, it cannot be essential to state that the seisin was of right. But independent of general reasoning, this mode of pleading is supported by precedents. In *Rastal's Entr.* title *Falsē Judgment*, pl. 9. fo. 323. *b.* ed. 1566. the count runs thus: *Et unde dicunt quod ipsimet fuerunt seisciti de mesuagiis terris & prædictis cum pertinentiis in dominico suo ut de feodo tempore pacis tempore Domini Regis nunc capiendo*, &c. In *Rastal Ent.* tit. *Formedon in Remainder (a)*, pl. 3. fo. 347. *b.* the words *de jure* are also omitted, and so in the bar to a count in a writ of right close, *Co. Entr.* tit. *Falsē Judgment*, pl. 2, fo. 306. *b.* 2dly, With respect to the repugnancy in deducing the title, the introduction of the word "heir" in describing *Hannah Ball*, must be taken to have no other effect than to point out the relationship in which she stood to *Thomas Gamlyn* the father. It would not have been sufficient to have described her as eldest sister, since that description would not have excluded the existence of a brother. But the word "heir" imports that the person to whom it is applied is the person through whom the succession to the estate is derived; and not that such person ever stood in the situation to claim the estate herself as having survived *Thomas Gamlyn* to whom she is described as heir. In *Hernes' Pleader*, tit. *Formedon in Reverter*, fo. 501. *b.* ed. 1657, there is a precedent to which the same objection would have applied. There *Richard* the demandant makes title to the land as the right heir of *E. F.* the donor thus: "and from the same *S.* and *A.* (the donees), for that they died without heirs of their bodies begotten, the right reverted by form, &c. to the same

(a) There are also three precedents in *Co. Ent.* tit. *Formedon*, viz. fo. 328. *b.* pl. 15. and 340. *b.* pl. 16. where the words *de jure* are altogether omitted.

Richard, who now demands as cousin and heir of the said *E. F.* to wit, son of *S. B.*, son and heir of *L. F.*, son and heir of *W. F.*, brother and heir of the said *E. F.* the donor, and which after the death," &c. *Richard* the demandant therefore was heir to the donor at the time of the death of the donees without issue, and consequently *S. B.* *L. F.* and *W. F.* through whom he claimed, must all have been dead at that time. In this indeed there is no repugnancy. But the plea shews that *J.* and *A.* the donees were the daughters of the donor: if therefore *W. F.* the donor's brother died before them, he could never have been heir to the donor. This is precisely the same objection as that which is now raised: and had it been considered of importance would probably have been taken advantage of in the former case. In the case of a lineal descent it may be incorrect to describe a person as heir to another who survived him; but in describing a collateral descent, the word "heir" is used to shew that the ancestor to whom it is applied would, if living, have been heir to the person last seized. If however it should be thought that the objection has any weight, yet as *Hannah Dowland* is properly described as cousin and heir of *William Gamlyn*, and the steps by which her title is deduced, are stated under a *scilicet*, the Court may reject the latter part as unnecessary (*a*), or consider the word "heir" as surplusage. Indeed the proceedings in a Court of this description are not to be canvassed with the same accuracy as the judgments of the Courts in *Westminster Hall*, as appears from *Ash v. Rogle and the Dean and Chapter of Saint Paul's*, 1 *Vern.* 367. *Show. Par. Cas.* 67. where a common recovery in a Court Baron was supported, though erroneous, not merely on the ground of its being a common assurance, but because it was suffered in a Court Baron.

[The counsel for the Plaintiff intimated that he should not insist upon the third objection, and the Court observed that there was nothing in it.]

Lens Serjt. for the Plaintiff. Undoubtedly these objections are very nice. But the Court must consider them as if taken upon a special demurrer: for as there has been a general demurrer in the Court below to which the statute respecting special demurrers does not extend, the assignments of errors upon the writ of false judg-

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(a) But it seems that it would not have been sufficient to describe the Demandant as cousin and heir, without shewing in what

manner she was heir. See 1 *Aff.* pl. 15. where this doctrine was laid down in a writ of *mordancester*.

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ment are in the nature of special causes of demurrer. 1st, It is not sufficient in a writ of right for the demandant to set forth a seisin only; he must shew that he has the mere right. The issue is not taken upon the seisin but upon the right; and unless an allegation of the right be made no issue can be taken. The passages cited from *Fitzherbert* only shew under what circumstances a writ of right may be maintained; but do not point out what particular allegations are necessary to be made in the count. So the case of *Dally v. King* only lays down that an allegation of an actual seisin is necessary, but does not say whether or not that seisin must be alleged to be of right. With respect to the case of *Wrottesley v. Adams*, though it was there said to be correct to describe a seisin in reversion "as of fee and right," yet it was not there holden that in a writ of right it would not be necessary to describe a seisin in possession as "of right" also: that was not a case of a writ of right; and the distinction there taken was between a seisin *in demesne as of fee*, and a seisin *as of fee and right*, the former of which was thought rather to apply to a seisin in possession on account of the word "demesne," and the latter to a seisin in reversion. As to the passage in *Co. Litt.*, though it be true that a seisin commencing by disseisin may in some cases be sufficient to maintain a writ of right, because the tenant may be precluded from disputing it, yet it by no means follows that such a seisin must not be alleged in the count to be a seisin of right. The entry in *Rastal*, tit. *False Judgment*, pl. 9. is indeed an authority in support of this count; but in that case as the parties joined issue on the fact, the objection could not arise; besides which it may be observed, that although the words "*de jure*" are omitted in the description of the seisin, the demandant at the beginning of the count claims the estate "as his right and inheritance," which in this case the demandant has omitted to do. As to the other entries cited from *Rastal*, tit. *Formedon*, and *Co. Entr.* tit. *False Judgment*, it may be observed, that the former is no authority in a writ of right, and that the omission of the words "*de jure*" in the latter was not in the count but in the bar (a). With the exception of the precedent in *Rastal*, tit. *False*

(a) Indeed in *Formedon* the general issue is not joined upon the mere right, as in a writ of right, but upon the gift of the donor. For the estate demanded and recovered in *Formedon* is not the mere right, i. e. the fee simple; but an estate tail. See *Booth* on Real Actions, fo. 88. See the form of the

general issue *non dedit*, *Co. Entr.* tit. *Formedon*, pl. 5. 14. 16. fo. 322. b. 329. b. 341. a. *Rast.* *Entr.* tit. *Formedon*, pl. 5. 14. 16. fo. 322. b. 329. b. 341. a. *Rastal.* *Entr.* tit. *Formedon* in Remainder, pl. 1, 2. fo. 347. tit. *Refeist in Formedon*, pl. 3. fo. 349. a.

Judgment, pl. 9. the entries will be found universally to have the words "*de feodo et jure*." To this effect are the entries in *Rastal*, tit. *Droyt Clofe*, pl. 1. fo. 233. pl. 5. fo. 234. b. ed. 1566, and another in the same book, title *Copyhold*, pl. 1: fo. 129. in which last case it appears to have been thought necessary in an action in the manor court in the nature of a writ of right patent, for the copyholder to allege his seisin *in dominico suo ut de feodo et jure ad voluntatem domini secundum consuetudinem*, &c. 2dly, If there be any inconsistency in the statement of the demandant's title, that part which creates the inconsistency, though under a *videlicet*, cannot be rejected, for it is perfectly clear that in a writ of right all allegations of title are material allegations, for the title must be regularly set out, and proved as laid. Now if any thing appear upon the face of the title which could not by possibility be proved, the title becomes defective: and in this case had the parties gone to trial, it would have been impossible to prove that *Hannab Ball* ever was the heir of *Thomas Gamlyn*. The demandant could not have resorted to any other mode of deriving his title than that set forth upon the record, and by that it appears that *Hannab Ball* died before *William Gamlyn*, who was the heir of *Thomas Gamlyn*.

Williams in reply insisted that a writ of false judgment could not be considered in the nature of a special demurrer, but was to be compared to a writ of error on which nothing but defects in substance can be taken advantage of: and that one precedent in point was sufficient to induce the Court in a cause of this sort to support the judgment given below.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

LORD ALVANLEY Ch. J. We are to decide whether any of the errors assigned upon this record are fatal; for if any of them prevail judgment must be given for the tenant. The errors assigned are three in number. The 1st objection is, that it is not alleged that *Thomas Gamlyn*, from whom the demandant deduces his title, was seised in his *demesne as of fee and right*. Upon this point we do not mean to decide the case. But thus far I will say, that the objection appears to me fatal, for all the precedents, with the single exception of one cited by my brother *Williams*, contain the above mentioned allegation. It was contended that the word "*right*" was unnecessary, except where a reversion is described, but that is not the case, for an estate in possession must be averred in the same manner as an estate in reversion, except that in the latter case the

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words "in his demesne" should be omitted. The Court however do not intend to give judgment upon that point, being clearly of opinion that the second objection is fatal. The second objection is, that no right is deduced from *Thomas Gamlyn* to *Thomas Dowland* the demandant, inasmuch as *Hannab Dowland* is alleged to be the heir of *William Gamlyn*, and the right to have descended to the said *Hannab Dowland* as the heir of *Hannab Ball*, which said *Hannab Ball* must therefore have died before the said *William Gamlyn*, or *Hannab Dowland* could not have been heir to *William Gamlyn*, or the right have descended from *William Gamlyn* immediately to her, and yet *Hannab Ball* is stated to have been sister and heir of *Thomas Gamlyn* the father, who must therefore have died in her lifetime, and to which *Thomas Gamlyn* the father, *William Gamlyn* the son, who survived *Hannab Ball* must have been heir, and to which *Thomas Gamlyn* the father *Hannab Ball* never could have been heir, if it be true as alleged that *Hannab Dowland* was heir to *William Gamlyn* at the time of his death, and that the right descended immediately from him to her. No doubt there is a complete blunder in the mode of deducing the title; and it is equally clear that if the title be not accurately deduced through a series of ancestors properly described, the demandant must fail. Now we are of opinion that this being a real action, though originating in a manor court, all the forms of proceeding must be as strictly observed as if it had been a writ of right originally commenced in this Court, and that the tenant has a right to avail himself of any inaccuracy which the demandant may have committed in the course of the proceedings. The consequence is, that there must be judgment for the tenant, and that the demandant take nothing by his writ.

Nov. 26th.

DOWSE Gent. Demandant, LLOYD Tenant, and
REEVE Vouchee.

Writ of entry
and subse-
quent pro-
ceedings in
a recovery
amended by
inserting the
words "all

and all manner of tithes whatsoever, yearly arising, &c. from and out of the said premises," on an affidavit setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises; the word "hereditaments" being contained in the deed to lead the uses.

BAYLEY Serjt. moved on the part of the vouchee, to amend the writ of entry and subsequent proceedings in a recovery suffered in *Michaelmas* Term, 39 *Geo.* 3. by inserting the words "and all and all manner of tithes whatsoever yearly arising, growing, or

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renewing from and out of the said premises." It appeared by the affidavit of the demandant that the grandfather of the vouchee by his will, dated the 14th of *October* 1785, gave and devised all and every his freehold manors, messuages, farms, lands, tenements, and hereditaments, situate in the counties of *Suffolk, Kent, Berks*, or elsewhere within the kingdom of *Great Britain*, thereinbefore undevised, to the use of his grandson *J. P. Reeve* and the heirs of his body; that the said *J. P. Reeve* by bargain and sale, dated the 26th day of *November* 1798, for the purpose of making a tenant to the *præcipe*, conveyed to *J. Lloyd* all that farm called *Grayberry's Farm*, with the several closes, pieces, and parcels of arable, meadow, pasture, and wood land thereto belonging, containing, &c. situate in the parish of *Eton Bridge*, in the county of *Kent*, and all other the manors, messuages, lands, tenements, and *hereditaments* of him the said *J. P. Reeve*, and which were theretofore the estate and inheritance of *J. Plumsted*, late of, &c. situate in the several parishes thereinbefore mentioned, together with all rights, privileges, advantages, *hereditaments*, and appurtenances* belonging or appertaining or to or with the same then or at any time theretofore held, used, occupied, possessed, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or as belonging thereunto respectively; and all the estate, right, title, interest, use, trust, possession, property, claim, and demand whatsoever of him the said *J. P. Reeve*, of, in, to, or out of the premises, to hold to the said *J. Lloyd*, his heirs and assigns, for the purpose of enabling him to suffer a recovery to enure to the use of the said *J. P. Reeve*, his heirs and assigns; that a recovery was accordingly suffered of lands in *Eton Bridge*, but that in the said recovery no mention was made of tithes, the demandant, who was concerned as attorney for *J. P. Reeve* the vouchee, not being apprised that the said *J. P. Reeve* was entitled to the tithes of the estate, but that he had since discovered that *J. Plumsted* was seised of the tithes of the estate, and that the same passed by his will to the said *J. P. Reeve* the vouchee. The affidavit further stated that it was the intention of the said *J. P. Reeve* and of the demandant, that the said bargain and sale and recovery should comprise all the estate and interest of the said *J. P. Reeve*, in the parish of *Eton Bridge*, which had passed to him by the will of the said *J. Plumsted* the testator.

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Bayley Serjt. relied on a case of *Milbanke v. Jolliffe*, decided in the Court of Pleas at *Durham*, 23^d July 1772, with the concurrence of the late Mr. Justice *Gould* and Mr. Justice *Willes*, who were consulted upon it (a).

The Court, after some hesitation on the part of Lord *Alvanley* Ch. J. allowed the amendment.

(a) The following is a note of that case.

Milbanke v. Jolliffe. In the Court of Pleas at *Durham*.

On the 11th of January 1704 *Ralph Hedworth* Esq. by his will devised to his son *John Hedworth* Esq. and his heirs, all his manor of *Chester* deanery, with the appurtenances, and all his messuages, lands, and hereditaments whatsoever in the county of *Durham*, and all other his real estates. On the 27th and 28th August 1714, by lease and release (on the marriage of *John Hedworth* with *Susannah Sophia Pelsant*) he conveyed to trustees all that the manor or lordship, or deanery of *Chester le Street*, with the appurtenances, and diverse lands, &c. (as described), and all other the messuages, lands, tenements, and hereditaments whatsoever of him the said *John Hedworth* in *Chester le Street*, or elsewhere in the county of *Durham*, wherein he had any estate of freehold or inheritance, together with all hereditaments, rights, members, and appurtenances, to the said manor, lordship, or deanery, and premises belonging, enjoyed therewith, or reputed as part thereof, (excepting tithes and mines), to the use of himself and his heirs until the marriage, then to himself for life, remainder to the first and other sons of the marriage in tail male, remainder to himself and the heirs male of his body, remainder to the daughters of the marriage in tail, remainder to his own right heirs. There was issue of this marriage one daughter only, *Eleanor*, married to Sir *Richard Hilton*, and mother of Mrs. *Jolliffe*. The said *John Hedworth* (previously to his marriage with a second wife, the mother of Lady *Milbanke*), being tenant in tail under the above settlement, barred the limitations to the daughters of the first marriage, by recovery suffered in consequence of a lease and release, dated the 4th and 5th September 1724, whereby he granted, bargained, sold, and released all that the manor or lordship,

or deanery of *Chester le Street*, with the appurtenances, &c. (describing the premises in the same words as used in the settlement), and all other his lands, tenements, coal-mines, tithes, and hereditaments whatsoever, to A. B. as tenant to the *precipe* for suffering a recovery to the use of himself in fee. The recovery was suffered on the 2d October, 11 G. 1. of the manor or deanery of *Chester le Street*, with its members and appurtenances, 30 messuages, 120 cottages, 1 dovehouse, 10 gardens, 1300 acres of land, 1400 acres of meadow, 1300 acres of pasture, 20 acres of wood, 200 acres of furze and heath, 400 acres of moor, and also mines of coal and common of pasture for all cattle, with the appurtenances in the parish of *Chester in the Street*. On the 15th December 1746 *John Hedworth* by his will devised to Sir *Richard Hilton* and Sir *Ralph Milbanke*, and their heirs, all that his deanery, prebend, rectory, and vicarage of the collegiate church and parish of *Chester in the Street*, and the manor and royalties thereof, and all tithes, &c. thereunto belonging, and all other his messuages, lands, and hereditaments, in trust as to one moiety thereof for his daughter *Eleanor*, Lady *Hilton* (mother of Mrs. *Jolliffe*), and the heirs of her body; and as to the other moiety for his daughter *Elizabeth* (the mother of Lady *Milbanke*), and the heirs of her body, with remainders to the heirs of his body. The testator gave his copyhold estates upon the like trusts, and in his devise thereof directed that if his daughter Lady *Hilton* should make any other claim upon them than under his will, every devise in her favour contained therein should be void. On the 26th and 27th June 1754, Sir *Richard* and Lady *Hilton* conveyed all that moiety and all other the part and share of Lady *Hilton* of and in the manor or deanery of *Chester le Street*, with the appurtenances, and the advowson, donation, and right of presentation of, in, and

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and to the church, curacy, or donative of *Chester* aforesaid, and of all those farmholds, tithes, &c. late of the said *John Hedworth*, &c. to a tenant to the *præcipe* for suffering a recovery, to the uses therein mentioned. The recovery then suffered was of a moiety of the manor or deanery of *Chester*, &c. and also of all and all manner of tithes, &c. and also of the advowson, donation, and right of presentation of, in, and to the church of *Chester in the Street*. Sir *Ralph* and Lady *Milbanke* afterwards suffered a recovery of the other moiety by the same description.

On the 31st of *March* 1772, Mr. *Jolliffe* contesting the alternate right of presentation derived through Lady *Milbanke*, a rule was obtained in the Court of Pleas at *Durham*, on behalf of Sir *R. Milbanke* and his eldest son by *Elizabeth* his wife deceased, calling on Mr. *Jolliffe* and *Eleanor* his wife to shew cause why the writ of entry of the recovery suffered by *John Hedworth*, 2d *October*, 11 *Geo. 1.* should not be amended by inserting the words, "*ac etiam advocacionem, presentationem, donationem, nominationem, liberam dispositionem et jus patronatus ecclesiæ de Chester le Street, ac etiam advocacionem, presentationem, donationem, liberam dispositionem et jus patronatus de curatione de Chester le Street,*" next after the words *quadragint. acras moræ*; and why the writ of seisin and the record of the recovery, and exemplification thereof, and all entries and proceedings relating to the same recovery, should not also be amended accordingly.

On the part of Mr. and Mrs. *Jolliffe* it was insisted, that by the settlement of the 27th and 28th of *August* 1714, the curacy of *Chester le Street* passed under the general word *hereditaments*, and was properly settled to uses, and remained so settled, there being no words in the recovery proper for a recovery to pass the nomination to the curacy,

consequently that Mrs. *Jolliffe*, as heir of the body of *John Hedworth* by *Susanna Sophia* his first wife, was solely entitled to the nomination. The amendment to the recovery therefore was opposed as affecting the right of Mr. *Jolliffe*.

On the part of Sir *Ralph Milbanke* and his son it was urged, that it appeared from the whole case, and particularly from the devises in the will of *John Hedworth* of the 15th of *December* 1746, that it was his intention by the settlement of 4th and 5th *September* 1724, and the recovery suffered thereupon, to include the advowson; and the recovery suffered by Sir *Richard* and Lady *Hilton* in 1754, was also relied upon to shew that they did not consider themselves entitled to more than a moiety of the advowson. It was therefore contended that as the intention of *John Hedworth* to include the advowson appeared, if the recovery did not contain proper words to effectuate such intention it was amendable.

The matter having been argued before the Justices of the Court of Pleas on the 16th *April* 1772, it was referred to Mr. Justice *Gould* and Mr. Justice *Willes*, the temporal chancellor of the county palatine of *Durham*, and both of them Justices of the Court, for their opinion thereupon, who were desired to appoint the parties to attend them by their counsel, if they thought proper, in order to have the said matter of law fully argued before them; and the said Justices were requested to certify their opinion to the said Court.

The certificate was as follows.

"We are of opinion that the recovery ought to be amended by inserting the words in the manner prayed by the motion. *H. Gould. E. Willes. Serjeants Inn, June 2d, 1772*"

On the 23d of *June* 1772, after hearing counsel on both sides, the Court of Pleas made the rule for the amendment absolute.

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of his creditor give goods out of his shop in part payment of a bond not then due, and shortly afterwards become bankrupt, the mere circumstance of the bond not being due will not alone vitiate the part payment on the ground of fraudulent preference.

PLAINTS FOR DEBT, before Lord Kenyon, and a verdict found for the Plaintiffs for 90*l.*, with liberty to the Defendant to move to have a nonsuit entered, if the Court should think him entitled to do so under the following circumstances. The bankrupt being indebted to the Defendant in 150*l.* for which he had given his promissory note, was applied to by her on the 10th of *September* 1800 for a further security, upon which he gave her a bond for payment of the debt with interest in six months. After this, hearing that the bankrupt was in failing circumstances, the Defendant on the 29th of *November* in the same year desired the bankrupt to let her have some of the goods out of his shop, which was a shop for the sale of earthen ware, and full of goods, in payment of her debt. The bankrupt having agreed to this, a person on behalf of the Defendant went to the bankrupt's house about 3 o'clock in the afternoon of the same day, and began packing up and sending away to the Defendant's a considerable quantity of *Staffordshire* ware. The packing up lasted till after it was dark, and some of the goods were removed in the dark, but no privacy in the transaction was attempted. The bankrupt made out a bill of parcels to the Defendant, in which he charged the goods at 90*l.*, which was more than their value, and an indorsement was made upon the bond for the receipt of 90*l.* in part payment of the debt. The quantity of *Staffordshire* ware removed was considerably more than the Defendant could have any use for in her family, and she was not in trade. On the 5th or 6th of *December* following, the bankrupt was arrested, and on the 9th, while in prison, executed an assignment of all his effects, which constituted the act of bankruptcy. It being contended that this was a fraudulent preference on the part of the bankrupt, because the bond was not due at the time the goods were required by the Defendant and delivered to her, Lord Kenyon advised the jury to find a verdict for the Plaintiffs for 90*l.* the amount of the charge in the bill of parcels, in order that the point might be

brought before the Court, and no further expence be incurred, if they should think such a verdict could be maintained in law.

Accordingly a rule *nisi* for entering a nonsuit having been obtained on a former day,

Best and *Praed* Serjts. now shewed cause. If the transfer of the property in question was made in contemplation of an act of bankruptcy, it was clearly void. Now the nature and quantity of the goods, as well as the time and manner of removal, equally shew that the transaction was not in the ordinary course of trade; and indeed the demand of the goods was founded on a knowledge that the bankrupt was in failing circumstances. It cannot be said that the transfer was made under any threat or fear of legal process, since the Defendant was not in a situation to threaten the bankrupt, the original debt being extinguished by the bond, and the bond itself not being due. The transaction therefore must be taken to be a voluntary transfer in contemplation of bankruptcy, for the purpose of giving the Defendant a preference over the other creditors. In *Alderson v. Temple*, 4 Burr. 2239. Lord Mansfield considers the question, whether a transfer made upon the eve of a bankruptcy be void or not, as depending on this, Whether it be done in the ordinary course of business? And in *Rust v. Cooper*, Cowp. 633. Lord Mansfield says, where a sale of goods is fraudulent, and done with no other view whatsoever but to defeat the equality of the bankrupt laws, it is void on account of such intended fraud; and he also relied on the circumstance that the Defendant in that case never bought or dealt in the kind of goods transferred. The case of *Smith v. Payne*, 6 Term Rep. 152. is no authority in the present case, because there the Jury expressly negatived any fraudulent preference, whereas here the question of fraud is left open for the Court to decide. Besides, in that case the debt was due (a) at the time when the goods were delivered to the creditor.

Shepherd Serjt. in support of the rule. The only question is, Whether the circumstance of the bond not being actually due at the time when the goods were delivered, will make that delivery void, which would clearly have been good had the bond been

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(a) Indeed in *Singleton and Others, Assignees of Howell v. Butler*, ante, p. 283. where payment of a note was defeated on the ground of fraudulent preference, Lord Eldon partly distinguished the case from that of *Smith v. Payne*, by observing that in the latter "the security was taken for a debt actually due."

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over-due? A bond is *debitum in presenti*, though *solvendum in futuro*; and if the obligor, upon application from the obligee, pay the debt before the day of payment expressed in the bond, there can be no ground to impute fraud. The case of *Thompson v. Freeman*, 1 Term. Rep. 155. is decisive of this point. For there the Defendant having joined with the bankrupt in two bonds, the latter, before the bonds became due, or the Defendant had been damnified, sent for the Defendant in consequence of a letter intimating his failing situation (which letter he by mistake conceived to have come from the Defendant's agents), and proposed to him to take out his debt in goods; to which the Defendant acceded, and a warrant of attorney was given, upon which the goods were taken; and the Defendant was held to be entitled to retain the goods.

LORD ALVANLEY Ch. J. The case of *Thompson v. Freeman* has satisfied the only doubt which I entertained. The impression of the case upon my mind was favourable to the Defendant, and I only wished for an authority to sanction my opinion: such an authority has now been produced, for the case of *Thompson v. Freeman*, as far as principle is concerned, is decisive of the present. In this case a debt was *bonâ fide* due from the bankrupt to the Defendant upon a promissory note; and the latter finding that the former was in failing circumstances, applied for a better security, and received a bond, with a condition that it should be void on payment of the debt in six months. Though it be clear in point of law that this bond extinguished the debt, and that it did not give any new right of action until after the lapse of six months; yet the parties probably knew nothing of all this; and for any thing that appears they may have supposed that the Defendant had the same right to enforce the bond by action which she had before to enforce the debt. Soon after the Defendant began to suspect that the bankrupt's circumstances were growing worse; upon which she demanded a further security for her debt, namely, a delivery of goods, which demand was accordingly complied with. It is admitted that a trader cannot in contemplation of bankruptcy dispose of his goods of his own accord without application on the part of his creditor. But it is not sufficient to avoid the delivery of goods by a trader that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contemplation

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tion at the time of the delivery. Nor has it ever been held that if a creditor presses for payment of his debt, and thereby obtains goods, that the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding. The case which has been cited directly applies. Mr. Justice *Buller* there left it to the Jury to consider, "whether the means which the bankrupt put into the Defendant's hands to pay himself were fraudulent or not; for if she had executed the warrant of attorney from necessity in order to save herself, though perhaps acting by mistake, or under a false apprehension that the Plaintiff was taking due means to enforce his demand upon her, it was certainly a legal act; but if she had acted with a view to favour the Defendant, and give him an unjust preference, it was void." From the report of Lord *Kenyon* we are certainly not to consider this as a case of fraud, except so far as fraud is to be inferred from the circumstance of the bond not being due. The cases of *Alderson v. Temple*, and *Harman v. Fisher*, proceeded on the ground of the transfer of property not being completed; and therefore do not apply to this case; but it has been established by subsequent decisions, that it is competent to a creditor to press his debtor for a further security at any time previous to the bankruptcy; and if a security be *bonâ fide* given under the impression of an obligation, and not springing from the voluntary act of the bankrupt, such security is good. And the case of *Thompson v. Freeman* completely satisfies me, that the circumstance of the bond not being enforceable by immediate arrest makes no difference. Here the Defendant demanded a further security for the debt previous to any act of bankruptcy; and we are not to presume that the delivery was voluntary on the part of the bankrupt, since we must understand from the report of the noble and learned Judge, that if it had not been for the question of law respecting the bond not being actually due, the Jury would have found a verdict for the Defendant.

HEATH J. I am of the same opinion. It appears to me that there is not only no fraud found in this case, but no ground from which the Jury could have inferred fraud. A bankrupt has the disposition of his property till the moment when he commits an act of bankruptcy; and unless he dispose of it *in fraudem legis*, his

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his transfer will be good. Fraud indeed changes the complexion of things both in civil and criminal cases. Thus if thieves under pretence of legal process persuade those within the house to open the door, and then rush in and rob the house, it is nevertheless burglary, for the law will supply the breaking, because the device by which they entered was *in fraudem legis*. But it is not sufficient to impeach a payment that the debtor voluntarily pay his creditor, unless at the time he so pay him he has an act of bankruptcy in contemplation. If a father advance portions to his children, such advance is voluntary, but not fraudulent, unless in contemplation of bankruptcy.

ROOKE J. I entirely concur in opinion with the rest of the Court in thinking that a nonsuit ought to be entered. There may perhaps be some circumstances in the report leading to a suspicion of fraud; but I have no doubt that if the whole case had been left to the jury, a verdict would have been found for the Defendant, and the imputation of fraud would have been negatived; for Lord *Kenyon* advised the Jury to find a verdict for the Plaintiff, merely for the purpose of bringing the question of law before this Court. The question, exclusive of fraud, is this, Whether the Court must necessarily imply this transaction to be illegal from the single circumstance of the bond not being due? It is true, that by giving the bond, the nature of the debt was changed, and the payment of it could not have been enforced at the time when these goods were given. But I do not hold that every *bonâ fide* payment of a debt, to which the party could not be absolutely compelled, is necessarily a fraud upon the bankrupt laws. Though the payment be so far voluntary that it could not have been enforced, yet it is not therefore void, unless made collusively between the parties in contemplation of bankruptcy. In the present instance the payment was by way of anticipation of a debt not then actually enforceable. Now the case of *Thompson v. Freeman* is in point to shew, that such a payment may be good if made at the request of the creditor. There is also a case of *Haffel v. Simpson, Co. B. L. 35. (a)* in which Lord *Mansfield* seems to hold the same doctrine. The bankrupt there having conveyed to the Defendant (who had become surety for him in a bond which the Defendant was not called upon to pay till after the bankruptcy) a copyhold estate and

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all his stock in trade, and personal estate, Lord *Mansfield* says, "if he had conveyed only the copyhold, and that at the request of the surety, it would have been good." This case appears to me strongly to corroborate that of *Thompson v. Freeman*. On general principles likewise a trader has as much right to pay his debts before they become actually due as any other person; and the creditor is not to lose the benefit of such payment because a bankruptcy ensues, unless it be made with a view to defeat the policy of the bankrupt laws.

CHAMBRE J. The payment of a debt before it is recoverable may be a material circumstance from whence a Jury may infer, together with other circumstances, that such payment was fraudulent. The rule appears to me to be this. Any payment made by a trader before an act of bankruptcy, and in contemplation of such act, and with a view on his part to give a preference to a particular creditor, is void. This doctrine indeed is new, and has been introduced within our own memory; but affords a good rule, because founded in equity. In this case however the question is, Whether the circumstance of the debt not being payable is of itself, and in point of law, sufficient to avoid the payment altogether as fraudulent? I cannot think that it is. It is perfectly clear that the Defendant in this case sought for payment of her debt, because she was apprehensive of a bankruptcy; judging from appearances, she thought her debtor in bad circumstances, and therefore used due diligence to obtain payment of her debt, as any fair creditor might have done. But we cannot say that the single circumstance of the bond not being payable at the time is sufficient to make the payment fraudulent. Perhaps it might have been as well if the whole question had been left to the Jury; but I understand from the report, that if this point had not occurred, the verdict must have been for the Defendant; and indeed I think it ought to be for the Defendant notwithstanding this point. Great stress has been laid on the late delivery of the goods, but although that circumstance shews that the Defendant was under apprehension, it does not prove fraud; for it appears that the persons who removed the goods began early, and we can only infer therefore that they were unwilling to leave the work unfinished. Indeed, if a fraudulent preference had been intended, the bankrupt would have paid off the whole debt, for the shop was full of goods, and those removed by the Defendant constituted only a small part of the stock.

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Besides the bankrupt made a very good bargain, for in making out his bill of parcels he charged the Defendant a higher price than the goods were worth. It is true that the Defendant could not have put the bond in suit at that time, but still she might have injured the bankrupt's credit by being clamorous for her debt, and perhaps have prevented him from continuing his trade. It appears to me therefore that if the case had been left entirely to the Jury, the weight of evidence was so much in the Defendant's favour, that they must have found for her; for I do not perceive any circumstance from which fraud can be inferred. Considering indeed that the payment of the bond at a time when it was not, capable of being enforced by action was the only point reserved, I think a nonsuit ought to be entered.

Rule absolute.

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FOOTT v. COARE.

If the Plaintiff in an action of assault having recovered only 20 shillings damages, whereby he is entitled to no more than 20 shillings costs, bring an action on the judgment, and obtaining judgment by default in that action enter it up for debt and costs, the Court on affidavit of the Defendant being resident in the city of London, and liable to be summoned to the Court of Requests, will, under the 39 and 40 Geo. 3. c. 104., set aside the judgment as to the costs.

THIS was an application to set aside the judgment entered up in this case as to the costs. The circumstances under which the application was made were as follow. In *Hilary* Term last the Plaintiff commenced an action of assault in this Court against the Defendant, and at the *Guildhall* Sittings after that Term obtained a verdict for 20 shillings, whereby he became entitled to no more costs than damages. The Plaintiff then brought an action of debt upon the judgment, upon which the Defendant's attorney tendered to the Plaintiff's attorney his 40 shillings, and gave him notice that if he took a judgment by default and entered it up for costs, the Court would be moved to set that judgment aside as to the costs. This tender was refused, and judgment being suffered to go by default, was signed by the Plaintiff's attorney for debt and costs in *Trinity* Term last, and an execution issued thereon in the vacation following. To found this application there was an affidavit on the part of the Defendant, stating that he was an inhabitant and resident in the city of *London*, and liable to be summoned to the Court of Requests in that city, and that the debt sued for and recovered by the Plaintiff amounted to no more than 40 shillings.

A rule *nisi* had been obtained on a former day, at which time the Court were referred to the 39 and 40 Geo. 3. c. 104. repeal-

ing so much of the statutes of *Jac.* 1. c. 15. and 14 *Geo.* 2. c. 10. as confined the jurisdiction of the Court of Requests to 40 shillings, and extending that jurisdiction to 5*l.* The 12th section of the act enacts, "that if any action or suit shall be commenced in any other court than the said Court of Requests for any debt not exceeding the sum of 5*l.* and recoverable by virtue of the statutes of *Jac.* 1. and *Geo.* 2. and of this act or any of them, in the said Court of Requests, then and in every such case the Plaintiff or Plaintiffs in such action or suit shall not by reason of a verdict for him, her, or them, or otherwise, have or be entitled to any costs whatsoever."

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Best Serjt. now shewed cause, and relied in the first place on an affidavit, stating, that when a plea was demanded of the Defendant's attorney, the answer given was, that the Plaintiff might take a judgment if he pleased: 2dly, He insisted that the application was made too late, for that the Plaintiff signed his judgment in *Trinity* Term last, at which time the Defendant ought to have applied to the Court, and not have suffered the Plaintiff to take out execution before he made any complaint (a): 3dly, He argued, that as this was the case of a judgment by default, the Court would not attend to the application, and cited *Brampton v. Crabb*, 1 *Str.* 46.: and, 4thly, That the words of the 39 and 40 *Geo.* 3. being, "by reason of a verdict or otherwise," this case did not fall within the provision, being a judgment by default.

Shepherd Serjt. in support of the rule observed, that even supposing the Defendant to be late in his application, still that objection could not apply to a case like the present, where the ground of the application was, that the judgment for the costs was void, the Plaintiff being deprived of costs by the provisions of 39 and 40 *Geo.* 3.; but he contended that the application was made as early as possible, the execution having only been taken out in the vacation (till which time the Defendant had no reason to suppose the Plaintiff would attempt to enforce a judgment contrary to law) and the Court being moved early in this Term. He also contended, that under the words "by verdict or otherwise," a judgment by default was clearly included, unless the words "or otherwise," were to be deemed altogether inoperative.

(a) But the judgment in this case being defective, not irregular, the lateness of the application could not cure the defect. *Goodwin v. Parry*, 4 *Term Rep.* 377. *Haffey v. Wilson*, 5 *Term Rep.* 254.

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CHAMBRE J. at first expressed some doubt, whether actions of debt upon judgment were not local, and therefore not within the provisions of the 39 and 40 Geo. 3.

But on considering the words of the act, which are (a), "all debts, whether upon simple contract or otherwise," and that the only exception of specialty debts was (b), "any debt by specialty which shall not be for the payment of a sum certain," and that actions on judgments were not within the exception,

The whole Court was of opinion that the present case fell within the provisions of the act, and that it would be most vexatious if every Plaintiff obtaining a small sum by way of damages should be at liberty to bring an action of debt upon the judgment in the superior court, and harass the Defendant with additional costs.

Rule absolute.

(a) S. 1.

(b) S. 11.

Nov. 27th.

LAWSON v. McDONALD.

Affidavit to hold to bail made by A. in respect of a debt due to B. before his discharge under an insolvent act, whereby B.'s estate became vested in the Clerk of the Peace, and negating a tender in bank notes to the knowledge or belief of A, held sufficient, the Court allowing A. and B. by subsequent affidavit to shew that A. usually transacted B.'s business when

THE Defendant in this case was holden to bail upon the affidavit of *Jonab M'Ewin*, who deposed that the Defendant was justly indebted to the estate of *Andrew M'Ewin*, formerly of, &c. late of, &c. and also late a prisoner in the *King's Bench* prison, and discharged therefrom under the late insolvent act, 41 Geo. 3., in the sum of 41*l.* 9*s.* 6*d.* for goods sold and delivered by the said *Andrew M'Ewin* to the Defendant before the 1st of *March* last, and before his taking the benefit of the said act; that the Defendant was commander of a ship bound for *Jamaica*, and that he was about to sail for *Jamaica* on *Saturday* then next, as the deponent had been informed and believed; that by virtue of the said act the legal estate of and in the effects of the said *Andrew M'Ewin*, which before the 1st of *March* last he was possessed of or entitled to, became vested in the Plaintiff, the clerk of the peace for the county of *Surry* in trust for the benefit of the creditors of the said *Andrew M'Ewin*, under and by virtue of the said act, as the deponent had been informed and believed; and that no tender or

out of town, and that at the time when the affidavit to hold to bail was made, B. was out of town, and that an immediate arrest was necessary, as the Defendant was about to sail on a voyage.

offer had been made to pay the said sum of 41 l. 9s. 6d. or any part thereof, in notes of the Governor and Company of the Bank of *England*, expressed to be payable on demand, to the knowledge or belief of the deponent.

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A rule *nisi* was obtained for discharging the Defendant upon a common appearance, on the ground of the tender in bank-notes not being properly negatived, inasmuch as it did not appear that *Jonab M'Ewin* the deponent had any connection with the parties to the action, and as he only negatived the tender to his knowledge or belief.

Shepherd Serjt. now shewed cause, and produced affidavits of *Jonab M'Ewin*, and also of *Andrew M'Ewin* the insolvent, the former of whom stated that he was the father of the insolvent; that he was in the habit of transacting his son's business when he was out of town, and that having heard that the Defendant was about to sail, he made the above affidavit for the purpose of holding him to bail: and the latter stated that he was out of town at the time when the arrest was made, and added that the debt was due, and that no tender in bank-notes had been made to him. He contended, that although no supplemental affidavit could be admitted for the purpose of supplying any defect in the original affidavit relative to the tender in bank-notes, yet that it was competent to the Plaintiff to produce affidavits to explain the situation of the Deponent in the affidavit to hold to bail, and to shew the reasons which entitled him to make such an affidavit; that it now appeared that the insolvent was not in town at the time when the arrest became necessary, and that his father had the management of his affairs when he was out of town, which therefore enabled him to make the affidavit; and that if he was entitled to make the affidavit, it could not be necessary that he should do more than swear to his knowledge and belief. He insisted that in these cases the affidavit must in general be made by some person different from the original creditor, since the insolvent himself is seldom to be found; and that the clerk of the peace could not be required to make it, since although the property be vested in him by law, he can know little of the affairs. He cited *Chatterley v. Finck*, ante, 390. to shew that an affidavit explanatory of the deponent's situation might now be received, and to prove, that where the principal is not in town the affidavit may be made by another person who has cognizance of the circumstances; also the *Mayor of Lon-*

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don v. Dias, 1 *East*. 237. to shew, that where the affidavit may be made by any person but the principal, it is sufficient if he negative a tender to the best of his knowledge and belief.

Best Serjt. contra relied upon *Bolt v. Miller*, *ante*, 420. to shew, that no such explanatory affidavits as had now been produced ought to be received, and also that at all events the insolvent ought to have joined in the affidavit (a); observing that it did not appear but that a tender might have been made to him previous to the 1st of *March*, when the assignment of his effects took place.

LORD ALVANLEY Ch. J. In a case circumstanced like this, it is impossible to expect a positive affidavit. But there must be reasonable evidence appearing upon the face of the original affidavit that no tender was made; and no supplemental affidavit as to that point can be admitted. But an affidavit may be admitted to shew, that the deponent was in such a situation as to entitle him to negative the tender to the best of his knowledge and belief. The best evidence must be obtained which the case will admit of. In this case the insolvent was out of town at the time of the arrest, and if the arrest had not been made then, the Defendant would have failed, and the opportunity of arresting would have been lost.

HEATH J. Every thing having been done in this case which could be done, I think that the arrest is good.

ROOKE and CHAMBRE Js. concurred.

Rule discharged.

(a) Had he been in *London* when the affidavit was made, this would have been necessary, according to the case of *Bolt v. Miller*,

and the tender must then, as it should seem, have been expressly negated, *ibid.* and *Elliott v. Duggan*, 2 *East*. 24.

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WHITBREAD v. MAY. and Another.

Nov. 28th.

THIS was an issue directed by the Court of Chancery under a decree made by the Master of the Rolls, to try, Whether the several lands (situate in the several parishes of *Hearne, Chislet, Winsborough, Sturry, Reculver, and Swacliffe*) which the Plaintiff contracted to sell to the Defendant, passed by the codicil to the will of the testator *Samuel Whitbread* (the Plaintiff's father), bearing date the 24th of June 1795?

The cause was tried before Lord *Eldon*, Ch. J. at the *Guildhall* Sittings after *Hilary* Term last, when a verdict was found for the Plaintiff, damages 20 *l.*, subject to the opinion of the Court on the following case.

On the part of the Plaintiff it was proved, that *Samuel Whitbread*, Esq. deceased, the father of the Plaintiff, being seized in fee of very considerable real estates situate in different parts of the kingdom, by his will, dated 24th June 1795, devised all and every his freehold estates and hereditaments whatsoever and wheresoever (except as therein was excepted) unto certain trustees therein named, and their heirs, upon the trusts in the said will specified, and amongst others in trust for his son *Samuel Whitbread*, Esq. the Plaintiff and his assigns, for life, with divers remainders over in strict settlement, and by a codicil to his said last will and testament, dated the 24th day of June 1795, the said testator devised as follows: "And whereas I have in and by my said will given, devised, and bequeathed, all and every my freehold estates and hereditaments whatsoever and wheresoever, except such of them as are included in my son's marriage settlement, and such parts of my brewhouse as are freehold, unto my son-in-law *James Gordon*, jun. and my nephews *Jacob Whitbread* and *John Wingate Jennings*, and their heirs, to the use of my son *Samuel Whitbread* for life, with remainder over as therein expressed; and it is my will and desire to give part of my estates, and herein-after mentioned lands, unto my son absolutely: now I do hereby revoke my said will so far as relates to my several estates at *Lusbill* in the county of *Wilts*, and *Hearne*, and *Buckland*, in the

A. devised his "estate at *Lusbill* in the county of *Wilts*, and *Hearne* and *Buckland* in the county of *Kent*," to his son in fee. At the time of the devise *A.* had lands in the parish of *Hearne*, and also in the several parishes of *C.*, *W.*, *S.*, *R.*, and *S.*, all which he purchased by one contract from one person, and used to call his "*Hearne* estate," or "*Hearne Bay* estates." The estate at *Lusbill* in *Wilts*, and also a farm called *Buckland Farm* in *Kent*, were sold before the testator's death, and at the time of his death he had no estate in *Kent* except that which lay in the parishes of *Hearne*, *C.*, *W.*, *S.*, *R.*, and *S.*

Q. Whether the above facts be admissible in evidence to shew that the testator intended to pass the land in the several

parishes of *C.*, *W.*, *S.*, *R.*, and *S.*, as well as that in the parish of *Hearne*?

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" county of *Kent*; and I do hereby give, devise, and bequeath,
 " the same estates at *Lusbill*, *Hearne*, and *Buckland*, unto my said son
 " *Samuel Whitbread*, his heirs and assigns, for ever, in order that he
 " may immediately sell the same if he thinks proper."

On the part of the Plaintiff was also read in evidence a general rental of all the testator's estates made out regularly in a book by his private clerk; and it was proved by that clerk that the testator was in the habit of constantly looking into and examining that book, in which was contained the following entry relating to the estates mentioned in the declaration in this cause, and referred to by the said will and codicil.

" *Kent.*

Hearne, &c.

Hearne Bay estates,

Purchased of Sir *George Colebrooke* Bart. and his trustees, 30th June 1773.

Consists of fundries, as under, expectant on the death of *Gilbert Knowler* Esq. in failure of issue by his wife *Barbara*; and after his death subject to the payment of 230*l. per annum*, part of 350*l. per annum*, her whole settlement payable to the said *Barbara* during her life, provided she survives the said *Gilbert Knowler*.

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The manors of *Underdowns* and *Lotting*.—A capital mansion-house and garden, with coach-house and stables, and other appurtenances, now in the occupation of Mr. *Knowler*, with the following lands, *viz.*

Pasture ground adjoining the house	-	£. 40	0	0
Hop ground	-	7	0	0
Wood ground about	-	60	0	0

£. 107 0

Nine messuages and tenements, being 4 farms and 5 cottages, with arable and pasture lands, in the parishes of *Hearne*, *Chislet*, *Winsborough*, *Sturry*, *Reculver*, and *Swacliffe*, amounting to about

453 0

£. 560 0 0

And the Plaintiff also produced in evidence a memorandum book, all in the testator's handwriting, containing a particular of the said estate purchased by him from Sir *George Colebrooke*

Bart. and his trustees; at the top of each page whereof in the said testator's writing, are the words "*Hearne* estate."

The estate in the several parishes of *Hearne*, *Chislet*, *Winsborough*, *Sturry*, *Reculver*, and *Swacliffe*, called by the said testator in his said books, "*the Hearne*," or "*Hearne Bay* estate," consists of the reversion or remainder expectant on the decease of *Gilbert Knowler* Esquire, of and in premises situate in the parish of *Hearne*, and also in the said several parishes of *Chislet*, *Winsborough*, *Sturry*, *Reculver*, and *Swacliffe*, the whole of which were purchased in one contract from *Gilbert Knowler* Esquire, by *Sir George Colebrooke*, and from him and his trustees by the testator; and it was proved that the testator used to speak of the whole together as the "*Hearne* estate;" but the same is not called or described by the name of the "*Hearne Bay* estate," in any of the title-deeds belonging to the said premises. The estate at *Lushill*, devised in the codicil with the *Hearne* estate, consists of the manor of *Lushill*, and between 500 and 600 acres of land in the parish of *Castle Eaton* and *Hannington*, in the county of *Wilts*, and was sold by the testator in his lifetime, after he had made his said will and codicil. The testator had no estate at *Buckland*; but the *Buckland* estate, also mentioned in the codicil, consisted of a messuage and about 10 acres of land, all in one farm, called *Buckland* farm, in the parish of *Winsborough*, and was also sold in the testator's lifetime, after he had made his said will and codicil. The testator at his decease had no estate whatever in the county of *Kent*, except the reversion of the said estate in the parishes of *Hearne*, *Chislet*, *Winsborough*, *Sturry*, *Reculver*, and *Swacliffe* above mentioned.

The question for the opinion of the Court is, Whether the evidence above stated to have been produced on the part of the Plaintiff ought to have been admitted at the trial of this cause, and whether the verdict of the Jury is supported by that evidence? If that evidence ought to have been admitted, and the verdict of the Jury is supported by it, the verdict to stand. If it ought not to have been admitted, or does not support the verdict of the Jury, a verdict to be entered for the Defendant.

This case was argued in *Trinity* Term last.

Best Serjt. for the Plaintiff. Upon the principles adopted in the determination of *Lord Walpole v. Lord Cholmondeley*, 7 Term Rep. 138.

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the evidence in question was properly admitted at the trial. In that case *Lawrence J.* says, "That in order to let in parol evidence, the Court must feel, that, if the evidence proposed be admitted, it will raise an ambiguity." Now, it is impossible to contend, that the evidence introduced into this case does not raise a doubt whether the testator did not, by the terms of his codicil, mean to describe all that property which he usually called his "*Hearne* estate," and not merely those lands which lay in the parish of *Hearne*. Indeed it is very improbable that the testator should have had the intention of separating a small part of that entire estate which he had purchased of Sir *George Colebrooke* from the residue. His intent appears to have been to pass all the lands of which he was possessed in *Kent*; and accordingly he mentions by name his *Buckland* estate, because that not being part of the lands purchased from Sir *George Colebrooke*, did not fall within the description of his *Hearne* estate. The case of *Doe d. Clements v. Collins*, 2 *Term Rep.* 498. is applicable to the present case in two respects; 1st, To shew the admissibility of evidence, to prove that premises not falling within the words of a will are to be annexed to those which do fall within the words of the will; and, 2dly, To shew that arguments of inconvenience arising from the separation of property, which has usually gone together, are entitled to great weight in construing the intention of a testator. So in *Bryan v. Wetherhead*, *Cro. Car.* 17. the Court received evidence to shew, that a building adjoining to a messuage, passed under the words "the messuage called *Keyshams cum appartenentiis*," and they were of opinion that it did not there pass, because it had not been reputed parcel of the house, and that case arose on the construction of a deed, yet *Hubart* conceived "that in a devise peradventure it might pass." The expressions of the testator respecting this estate are stronger evidence in the construction of this devise than any which could result from common reputation; and indeed it would be absurd to suppose that he meant to give his son the power of selling only a small part of a particular estate, at the same time that he was tying up the remainder in strict settlement.

Heywood Serjt. contra. The evidence in this case was improperly admitted; and even if it was properly admitted, still the verdict as found by the Jury is not supported by that evidence. The case of *Lord Walpole v. Lord Cheshamdeley* has established the true distinction,

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viz. that parol evidence is not admissible, unless, if admitted, it would raise a doubt to what the words of the will apply. If it only raise a conjecture, it is not sufficient. Now, in the present case, the premises in question were described by the testator as the “*Hearne Bay* estate,” and the “*Hearne* estate;” but the words in the codicil are “my estates at *Lushill*, *Hearne*, and *Buckland*.” The testator had lands in the parish of *Hearne* sufficient to satisfy the words of the will; if, therefore, evidence be admitted to shew that lands in five other parishes were intended to pass under the words of the codicil, it will not be admitted in explanation, but in contradiction of the codicil. It is true, that in *Godbolt* 16. under a devise of a house and lands called “*Jacks*,” it was held that 100 acres of lands passed; but the reason given by *Anderson* Ch. J. for that decision was, “that *Jacks* was the entire name of the house and lands;” whereas *Hearne* is not the entire name applicable to the lands in question, since the greater part of them lie in parishes bearing other names. So in *Wyndham v. Wyndham*, 1 *And.* 58. the Court admitted evidence to shew, that a messuage, described to be the messuage *Ricardi Cotton* at *H.* in a deed of feoffment, was so named by the feoffor by mistake, he having no messuage at *H.* but one which belonged to *Thomas Cotton*. If the verdict of the Jury is to stand, their decision in effect will be, that these lands lie at *Hearne*, when in fact they do not lie there. Nothing appears upon which either the Jury or the Court can raise a doubt; and indeed no case can be cited in which a will has been explained by evidence, where there has been something upon which the words of the will could operate.

Cur. adv. vult.

On this day Lord ALVANLEY Ch. J. said—There is a difference of opinion upon the Bench as to the admissibility of the evidence in this case; and in consequence of that difference of opinion no conclusive judgment can be given in this Court. We have therefore communicated with the Lord Chancellor, before whom the cause was tried, upon the subject, and his Lordship has declared himself ready to put his seal to a bill of exceptions as if tendered to him at the trial, in order to enable the parties to take the opinion of another Court. The question will be, Whether the words “the same estates at *Lushill*, *Hearne*, and *Buckland*,” are so descriptive of locality as to preclude the admissibility of evidence

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that the testator intended to use them in any other sense? In this Court judgment *pro forma* must of course be given for the Plaintiff.
Judgment for the Plaintiff.

Nov. 28th.

CUNNINGHAM v. MACKENZIE and Another.

If in the deed securing an annuity it be declared, that the judgment to be obtained under a warrant of attorney given at the same time shall be only a collateral security for the regular payment of the annuity, and that no execution shall issue thereon till default made in the payment for 14 days, and the memorial does not notice the above declaration, and in setting forth the warrant of attorney only states generally that "such warrant of attorney was executed for the better securing the payment of the annuity as in the above stated deed is particularly mentioned;" the Court will set aside the annuity for such defect in the memorial.

THIS was an application to the Court to set aside a judgment entered up on a warrant of attorney given to secure an annuity, and to have the warrant of attorney delivered up to be cancelled.

The principal objection to the annuity was, that in the indenture by which it was secured it was declared that the judgment to be obtained under the warrant of attorney was to be only a collateral security for the regular payment of the annuity, and that it was agreed that no execution should be issued or taken out thereon until default should be made in the payment of the annuity by the space of fourteen days, whereas the memorial in setting forth the deed, did not specify any such declaration or agreement; and in setting forth the warrant of attorney, it only stated generally that such warrant of attorney was "executed for the better securing the payment of the annuity, as in the above stated deed is particularly mentioned."

Shepherd Serjt. shewed cause and contended, that it was apparent upon the face of the memorial that the warrant of attorney was given as a collateral security for the payment of the annuity; and if it were a collateral security it followed that no execution could be taken out until default made in payment of the annuity; that a proviso of this sort did not resemble a proviso of redemption, which is an essential part of the description of the annuity granted, a redeemable annuity being a distinct thing from an annuity which is irredeemable; whereas the proviso in the present case only related to the mode of obtaining a remedy in case of default being made in payment.

Best Serjt. on the other side was stopped by the Court.

LORD ALVANLEY Ch. J. The ground on which the Court of *King's Bench* proceeded in the case of *Sawyer v. Bance* (a), was that the clause of redemption being for the benefit of the grantor, it was right that he should have an easy access to it. If so, how does the present case vary in point of principle? Undoubtedly the clause omitted to be noticed in the memorial is a clause introduced for the benefit of the grantor.

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HEATH J. I see no distinction between this case and those in which annuities have been set aside because the clause of redemption was not noticed in the memorial. Possibly the grantor of this annuity never would have entered into the engagement which he has done, if this clause restraining the issuing any execution against him for a certain period had not been introduced.

ROOKE J. I am of the same opinion.

CHAMBRE J. This clause in favour of the grantor appears to me more necessary to be inserted than the clause of redemption, because this is to regulate the annuity while it subsists, whereas the other is only to put an end to it.

However, LORD ALVANLEY Ch. J. expressing a wish to have an opportunity of looking into the cases before the point was finally decided, the case stood over till this day, when his Lordship and the rest of the Court retaining the opinion thrown out by them when the case was argued.

The rule was made absolute.

(a) *E. 35. G. 3. B. R. Hunt on Annuities*, c. 1. s. 5. p. 74. *Ed. 2.* cited 6 *Term Rep.* 737. *Harris v. Stapleton*, 7 *Term Rep.* 205. and *ex parte Ansell*, *ante*, vol. 1. p. 62.

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Nov. 28th. **GOODRIGHT** on the several demises of *George Earl of Buckinghamshire*, and *Albinia* his Wife, **Sir CHARLES STEWART** and **ANNE LOUISA** his Wife, **JOHN Earl of Westmoreland**, and **THOMAS FANE**,

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ARTHUR Marquis of Downshire, and **MARY** his Wife.

A. devised certain estates to *B.* for life remainder to his sons and daughters in strict settlement, remainder to *C.* for life, remainder to his sons and daughters in like manner, remainder to his own right heirs, and died. *B.* being seised of the above estates as tenant for life, and also entitled to one sixth of the reversion as one of the

EJECTMENT for one third part of a moiety of lands in *Chislehurst*, *Mottingham*, and *Bromley*, in the county of *Kent*. The cause was tried at the *Maidstone* Summer Assizes 1800, and a verdict was found for the Plaintiffs, subject to the opinion of the Court on the following case.

Thomas Farrington of *Chislehurst* in the county of *Kent*, Esq. being seised in fee-simple (amongst others) of certain estates in *Chislehurst*, *Mottingham*, and *Bromley*, in the said county (which estates are of the tenure of *Gavelkind*) duly made and published his last will and testament, which bears date the 13th day of *January* 1758, and is attested by three witnesses; and he thereby gave and devised all his manors, messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever, which he, &c. unto and to the use of his nephew *Lord Robert Bertie*, and his assigns, for his life, remainder to the use of trustees and their heirs during the life of the said *Lord Robert Bertie* in trust, to pre-

serve the right heirs of *A.*, made his will, whereby he gave to his wife for life, all such freehold and copyhold lands as he had purchased or was seised of in fee-simple, or in exchange for other lands in *Kent*, and then after reciting that he had granted a lease for years to *D.* of the lands whereof he was tenant for life under *A.*'s will, declared that in case such persons as should be tenants for life or otherwise of that estate by virtue of *A.*'s will should not molest *D.* in the possession of the said lands as leased, and at the expiration of the lease should grant a new lease to his, *B.*'s, wife for her life, then he devised his lands purchased of *E.* and *F.* and all lands that he then had or might have a right to, both freehold and copyhold, arising from exchange of land, act of Parliament, or otherwise in *Kent*, devised to his wife for her life, to go with and be subject to the same entail as the estates left by *A.* were or might be subject to by virtue of *A.*'s will, to take effect immediately after the decease of his wife, and in such case recommended his wife to give the furniture which belonged to the house on the estates left by *A.* to whomsoever might be living to enjoy it; but in case such persons as should be tenants for life or otherwise by virtue of *A.*'s will should refuse to grant such lease, or should disturb *D.*, then he gave to his said wife and her heirs all his freehold and copyhold lands and houses which he had before devised to her for life only. And all the rest and residue of his real estate whatsoever, and all the rest and residue of his personal estate of what nature or kind soever or wheresoever, he gave to his said wife and her heirs, executors, administrators, and assigns for ever. *D.* was not molested, and a new lease was granted to the wife of *B.* for her life. Held that the wife of *B.* was entitled to the one sixth of the reversion under the residuary clause in *B.*'s will.

serve

serve contingent remainders, with remainder to the use of the first and other sons of the said Lord *Robert Bertie*, and the heirs of their bodies severally and in succession; and in default of such issue, to the use of the first and other daughters of the said Lord *Robert Bertie*, and the heirs of their bodies severally and in succession; and for default of such issue, to the use of his cousin *Charles Townshend*, Esq: for his life, with remainder to the use of trustees and their heirs during the life of the said *Charles Townshend* in trust, to preserve contingent remainders, with remainder to the use of the first and other sons of the said *Charles Townshend*, and the heirs of the bodies of such sons severally and in succession; and in default of such issue, to the use of the first and other daughters of the said *Charles Townshend*, and the heirs of their bodies severally and in succession; and in default of such issue, then he gave and devised all and every his said manors, messuages, lands, tenements, hereditaments, and real estate aforesaid, unto his own right heirs for ever.

The said *Thomas Farrington* died seised of the said estates in the month of *February* 1758, leaving the descendants of his deceased sister, *Albinia* the wife of the Duke of *Ancafter*, that is to say, Lord *Vere Bertie*, *Augusta Bertie* and *Frances Bertie* the only children of Lord *Montagu Bertie* then deceased, and Lord *Robert Bertie* named in the will of the said testator, the said Lord *Vere Bertie*, Lord *Montagu Bertie*, and Lord *Robert Bertie* being the sons of the said *Albinia* Duchess of *Ancafter*, and his the testator's other sister *Mary Selwyn*, his heirs according to the custom of gavelkind.

Upon the death of the said *Thomas Farrington*, the said Lord *Robert Bertie* entered upon and took possession of the said estates in *Chislehurst*, *Mottingham*, and *Bromley*, and continued to receive the rents and profits thereof until the time of his death, which happened on the 10th of *March* 1782.

The said Lord *Robert Bertie* left no issue, and on his decease the said *Charles Townshend* entered upon and took possession of the said estates, and continued to receive the rents and profits thereof until the time of his death; and he died on the 10th day of *August* 1799 without leaving any issue.

The said Lord *Vere Bertie* died in the year 1770, leaving *Albinia*, now the wife of George Earl of *Buckinghamshire*, and *Ann Louisa*,

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now the wife of Sir *Charles Stewart*, his daughters and coheirs according to the custom of gavelkind.

The said *Augusta*, one of the daughters of the said Lord *Montagu Bertie*, intermarried with Lord *Berghersh*, and died on the third of *January* 1766, leaving *John*, now Earl of *Westmoreland*, and the Honourable *Thomas Fane*, her sons and coheirs according to the custom of gavelkind; and the said *Frances*, the other daughter of the said Lord *Montagu Bertie*, died in or before the month of *February* 1771, leaving the said *John* Earl of *Westmoreland*, and the said *Thomas Fane*, her nephews and coheirs according to the custom of gavelkind.

The said Lord *Robert Bertie* at the time of his death, which happened on the 10th *March* 1782, as before stated, left the said *Albinia*, the wife of the said *George* Earl of *Buckinghamshire*, *Ann Louisa*, the wife of the said *Charles Stewart*, *John* Earl of *Westmoreland*, and *Thomas Fane*, the lessors of the Plaintiff, his heirs according to the custom of gavelkind.

The said Lord *Robert Bertie* being in possession of the said estates in *Chislehurst*, *Mottingham*, and *Bromley*, devised to him by the said will of the said *Thomas Farrington*, and being seised in fee-simple of certain other freehold estates in *Chislehurst* aforesaid, which he had purchased or taken in exchange, duly made and published his last will and testament in writing, which bears date the 7th day of *March* 1782, and is attested by three witnesses; and he thereby gave and devised unto his dear wife and her assigns, during her life, all such freehold and copyhold lands which he had purchased, and which he was seised of in fee-simple, or in exchange for other lands in *Kent*; and he thereby also gave and devised in manner following; that is to say, "And whereas I have granted a lease, of *Chislehurst* house, gardens, meadows, and other lands in hand, and also of *Holbrookwood*, to the Honourable Mrs. *Ann Maria Blundell*, for the term of eleven years from *Lady Day* 1778, at the yearly rent of 84 *l.* 1 *s.*; which lands and woods were valued by *Richard Busby* of *Chislehurst*, steward to the Right Honourable *Thomas Townshend*, and *James Wiffin* of *Chislehurst*, my steward, at the yearly value of 4 *l.* 1 *s.* Now my will and meaning is, that in case such of my relations as shall be tenant or tenants for life or lives of the *Chislehurst* estate, by virtue of my uncle Mr. *Thomas Farrington's* will, shall not molest the said Honourable Mrs. *Ann Maria Blundell*, in the quiet possession of the said house and

and lands so leased to her, and shall at the expiration of the said lease grant a new lease of the said house and lands to my wife Lady Robert Bertie for the term of eleven years, if she my said wife shall so long live, and renew it as often as she may require, under the same covenants, and at the same rent, so that she may enjoy it during her natural life; I do then and in that case give and devise my lands and houses purchased of *William Russell*, and lands purchased of Lord *Camden*, with the houses thereon, and all lands that I now have or may have a right to, both freehold and copyhold, arising from exchange of lands, acts of Parliament, or otherwise, in *Kent*, devised to my wife for her life, to go with and be subject to the same entail, as the estates at *Chislehurst*, left to me by my uncle *Thomas Farrington*, are or may be subject to by virtue of his said will, to take effect immediately after the decease of my said wife; and then and in such case I do recommend and desire my said wife to give the furniture which now belongs to the house and farm to whomsoever may be living, to enjoy the *Chislehurst* estate after her decease; but in case *Charles Townshend*, Esq. or such of my relations as shall be tenant or tenants for life, or otherwise entitled to the *Chislehurst* estate, by virtue of the said will, shall refuse or neglect from time to time to grant such lease or leases in manner aforesaid, or disturb the said Honourable Mrs. *Ann Maria Blundell* or her assigns, or my wife or her assigns, in the possession of the said house or premises during her life, then and in such case I give and devise to my said wife, her heirs, and assigns for ever, all my said freehold and copyhold houses and lands, which I have before devised to her for her life only, and all the rest and residue of my real estates whatsoever; and all the rest and residue of my personal estate of what nature or kind soever or wheresoever, I give, devise, and bequeath, to my said wife, her heirs, executors, administrators, and assigns, for ever."

The Honourable Mrs. *Ann Maria Blundell*, named in the will of the said Lord Robert Bertie, was not molested in the quiet possession of the house and premises, of which he had granted her a lease. She died on the 16th of November 1798, and at or before the expiration of the said lease, the said *Charles Townshend* being then the tenant for life of the *Chislehurst* estate, by virtue of the said will of the said *Thomas Farrington*, granted a lease of the said house and premises to Lady Robert Bertie, the widow of the said Lord Robert Bertie, as directed by his said will, under which

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she enjoyed and had the possession of the said house and premises so long as she thought proper.

The said Lady *Robert Bertie* died on the 13th of *April* 1798, leaving *Mary*, the wife of *Arthur* Marquis of *Downshire*, her heir according to the custom of gavelkind.

The premises for which this ejectment was brought were part of the estates devised by the will of the said *Thomas Farrington*, and the question for the opinion of the Court was, Whether the lessors of the Plaintiff or any of them were entitled to recover the possession of the premises in question in this action, or any part thereof? And if this Court should be of opinion that the lessors of the Plaintiff, or any of them, were entitled to recover, the verdict was to be entered according to such opinion: but if the Court should be of opinion that the lessors of the Plaintiff, or any of them, were not entitled to recover, then a verdict was to be entered for the Defendants.

This case was argued three times; 1st, In *Easter* Term last by *Shepherd* Serjt. for the Plaintiffs, and *Best* Serjt. for the Defendants; 2dly, By *Lens* Serjt. for the former, and *Bayley* Serjt. for the latter; and now again in this term by *Shepherd* Serjt. for the Plaintiffs, and *Williams* Serjt. for the Defendants.

Arguments for the Plaintiffs.—Admitting that the residuary clause in Lord *Robert Bertie*'s will be sufficiently comprehensive to carry the ultimate reversion of the estates devised by Mr. *Farrington*'s will to which he was entitled, yet if it appear to have been his intention not to include such reversion in the residuary clause, it will not pass under that clause, though no express mention was made of it in the former part of the will. *Strong v. Teatt*, 2 *Bur.* 912. 1 *Bl.* 200. The question therefore turns upon the intention of the testator, as it is to be collected from the situation of the parties, and from the will. From the situation of these parties, and the interest of Lord *Robert Bertie*, it appears not only that he meant to give this reversion, but the reason is plain why he did so. Lord *Robert Bertie* had a power over the whole estate for his life; but in case he died without children, his whole interest (exclusive of his share in the ultimate reversion) became extinct. The next in remainder was Mr. *C. Townshend*, to whom the estate was limited in strict settlement. The object therefore of Lord *Robert Bertie* was after his death to secure to Mrs. *Blundell* the quiet enjoyment of the house and lands at *Gbisleburst* during the conti-

nuance of the lease granted by him, and a renewal of the lease upon the same terms on the expiration thereof, to his wife for her life. In order therefore to induce Mr. *C. Townshend* and his issue, and the heirs of Mr. *Farrington* (of which Lord *Robert Bertie* was but one) to acquiesce in these views, he declares, that provided they do so, all the lands over which he has a controul, and which he has devised to his wife for life, shall go in the same line as the estates left to him by Mr. *Farrington's* will, to take effect immediately after the decease of his wife. And though indeed he uses the expression "subject to the same entail," yet the meaning of that expression must be understood to be, that they shall be subject to the same sort of limitation, in which case the ultimate limitation to the heirs of Mr. *Farrington* will be included; and Lord *Robert Bertie's* share of the reversion, instead of going to his wife, will go among the heirs of Mr. *Farrington*. The manifest intention of the testator appears to have been to secure to his wife for her life every thing over which he had no control; and in order to effectuate that intention, he was willing to give every thing over which he had a control to the persons in whose power it might be, as entitled to the *Farrington* estates, to contravene his intention in favour of his wife. This appears strongly from the recommendation to his wife to give the furniture belonging to the *Chislehurst* house to the person who should be living to enjoy the house after her decease, provided she were permitted to continue in it during her life. It can scarcely be supposed to have been the intention of the testator to give this remote reversion to his wife by the residuary clause, when the manifest object of the will appears to have been, to secure a provision to his wife for her life; and when it is considered that the lands which he had himself purchased are only given to her in fee, in case she should not be permitted to enjoy the *Farrington* estate for her life. Besides, considering that Mr. *C. Townshend*, who was the next in the entail, was only thirty-six years of age, whereas Lady *Robert Bertie* was sixty-four (a), the probability was, that she would never enjoy the reversion during her life. It seems indeed to have been decidedly the testator's wish, that the *Farrington* estate and his own estates

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(a) The respective ages of Mr. *Charles Townshend* and Lady *Robert Bertie* at the date of Lord *Robert Bertie's* will, together with some other facts, were added to the

case after the second argument at the desire of the Court, and are stated by Lord *Alvanley* Ch. J. in the beginning of the judgment.

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should be enjoyed together, and go in the same line, which object would be altogether defeated, by holding that the ultimate reversion in the former passed to Lady *Robert Bertie* under the residuary clause, while the latter are expressly limited to follow the entail of the *Farrington* estate, and must therefore go to the heirs of Mr. *Farrington*. If then it appear to have been the intention of the testator that the reversion should go according to the limitation of the *Farrington* estate, the words in the will are fully sufficient to effect that purpose. For the testator first gives to his wife for life all the estates of which he was seized in fee-simple; and he afterwards directs that all lands in *Kent*, both freehold and copyhold, arising from exchange of lands, acts of Parliament, or otherwise devised to his wife for life, shall go with and be subject to the same entail as the *Farrington* estates. Now the words "seized in fee-simple," in the first devise to his wife for life, are sufficient to include the reversion; and the words "or otherwise," in the subsequent limitation, will also include the same whether it came to the testator by descent from Mr. *Farrington*, or by the devise in his will; and the words "shall go with," will carry the limitation to the heirs of Mr. *Farrington*, even supposing the words "subject to the same entail" to be inadequate to that purpose. It is not necessary to contend that the right heirs of Mr. *Farrington* would take as purchasers; for though they should be entitled to take by descent, yet the mention of them in the will as devisees, is sufficient to except the estate devised out of the residuary clause. *Smith d. Davis v. Saunders*, 2 Bl. 736. and *Amesbury v. Brown*, coram Lord *Hardwicke*, cit. *ibid*. If however it can be supposed that the reversion was altogether out of the contemplation of the testator, then it neither passed by the special limitations or by the residuary clause; and it must therefore descend to the lessors of the Plaintiff as the heirs of Mr. *Farrington*.

Arguments for the Defendants.—Unless this reversion can be held to pass by implication under the limitations in the former part of the will, it will pass under the residuary devise to Lady *Robert Bertie*; for although this particular reversion may not have been in the contemplation of the testator Lord *Robert Bertie*, yet as it appears to have been his intention that every thing to which he was entitled should pass to his wife, and the words are large enough to include the reversion, it will accordingly pass. *Freeman v. The Duke of Chandos*, Cowp. 360. 363. Supposing Lord *Robert*

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Bertie not to have been aware that he was entitled to devise this reversion, it clearly would not pass under the special limitations in his will; on the other hand, supposing him to have been aware that he was entitled to devise it, he has not used expressions calculated to convey it to the heirs of Mr. *Farrington*; for the limitation of the ultimate reversion in Mr. *Farrington's* will had no operation, since that will only directed that the reversion should go to those very persons who would take it by descent. Mr. *Farrington's* will therefore created nothing but estates for life and estates in tail, consequently when Lord *Robert Bertie* directs that the reversion shall go according to the entail in Mr. *Farrington's* will, that devise can extend no farther than the estates created by the will to which he alludes. There is nothing upon the face of Lord *Robert Bertie's* will to shew that he had this reversion in contemplation, for though the words "seised in fee simple" in the first limitation to his wife for life are sufficient to include the reversion, provided an intention to pass it be manifest, yet those words seem rather to describe estates in possession; and if the reversion was not included in the first limitation, it cannot be included in the second, which is expressly confined to the estates before devised for life to Lady *Robert Bertie*. In the next place, it does not appear to have been in the contemplation of Lord *Robert Bertie* that the heirs of Mr. *Farrington* could have it in their power to molest his wife, but only the persons claiming under the will; it is not therefore to be presumed that any thing was given as a reward for abstaining from such molestation, to any persons but those whom he thought entitled to molest her; for Lord *Robert Bertie* speaks only "of tenant or tenants for life, or otherwise entitled to the said *Chislehurst* estate by virtue of the said will." It has been contended that the testator must have intended to devise the reversion to the heirs of Mr. *Farrington*, because otherwise the lands which he had himself purchased would go in a different channel; but that is not so, for under the word "entail" neither the one nor the other description of lands were limited to any persons but the lineal descendants of Mr. *C. Townsend*. It is not to be presumed that the testator was ignorant of the meaning of the word "entail," but that he knew the law as well as any other person. *Purfoy v. Rogers*, 2 *Saund.* 384. If the devise of the reversion be extended to the right heirs of Mr. *Farrington*, yet it cannot go with and be subject to the same entail, for in one case the heirs of Mr. *Farrington* would take a different

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Cur. adv. vult.

On this day the opinion of the Court was delivered by Lord ALVANLEY Ch. J. After this case had been argued the second time at the bar, the Court expressed a desire to be informed of the ages of Lady *Robert Bertie* and Mr. *Charles Townshend* at the time when Lord *Robert Bertie* made his will, and also whether Lord *Robert Bertie* had any estates in possession except his estates in *Kent*. This was done with a view to ascertain the intent of the testator respecting the annexation of the estates, and the effect of the residuary clause. It had been argued that Mr. *Charles Townshend* was so much younger than Lady *Robert Bertie*, that the testator could never have thought of guarding his wife against anything which was to happen after the death of Mr. *C. Townshend* without

without issue; but it now appears that at the time when he made his will Lady *Robert Bertie* was 64 years of age and Mr. *C. Townshend* 49, and unmarried. There was therefore only 15 years difference between their ages; and as Mr. *C. Townshend* had no issue, the possibility of the event taking place was not very remote. It also appears that the testator was seised of a fee farm rent in *Middlesex* of about 16*l. per annum*; his right to which, although disputed, and the arrears of rent withheld for four years before his death, was constantly asserted by him. This must therefore be taken to be a subject upon which the residuary clause might operate out of the county of *Kent*. The question then, and the only question in this case is, Whether the one third of a moiety of the estates devised by *Thomas Farrington* to his right heirs (but which notwithstanding certainly descended upon them), and of which right heirs Lord *Robert Bertie* was one, passed by the residuary clause of Lord *Robert Bertie's* will? The principles upon which this case is to be determined were not disputed. It was admitted on the part of the lessors of the Plaintiff, that it was incumbent upon them to prove by necessary consequence arising from the other parts of the will, that the residuary clause had not the operation which according to the rules of construction it was allowed to have, namely, that of carrying every real interest of every kind whatsoever, whether known or unknown to the testator, provided it were not manifestly excluded. It was admitted that it was necessary to shew that it would be inconsistent with the general intent of the testator and the particular provisions of the will to impute to the testator any intention to convey the one third of a moiety of the estate of which he was seised as right heir of Mr. *Farrington*; and that it was not necessary that the testator's mind should be active in including the subject matter, but that even if he did not know that he had it, still it would pass, provided he did not mean to exclude it. Looking therefore at the provisions of this will we are to consider, not whether the testator had not this particular estate in contemplation, but whether he meant that the residuary clause should not have that effect which the law attributes to it. This is the principle upon which analogous cases have been determined. Of these I will presently mention two or three. I will state the governing principle of those cases, and the grounds upon which it was held in one case that the testator did not intend that the lands should pass, and in another that they did pass; and by

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comparing the grounds of these cases with the case now before the Court, I will endeavour to shew how far they are analogous in the construction of this testator's intent, and whether any one of them will enable us to decide that the lands in question were not included in the residuary clause. In order to prove that the lands in question were not included, much argument was used to shew that the effect of this will was to annex the purchased estates to the settled estates, not only during the continuance of the estate tail, but also when the settled estates should come into the hands of those who should be entitled to the reversion in fee. For the sake of argument, I will suppose this to have been the intent of the testator, it not being a very improbable intent, considering that the general object of the testator was to secure at all events to his wife that part of the settled estates over which he had no power, by holding out to those entitled to the settled estates that they should have the enjoyment of his unsettled estates after the death of his wife. Then taking this to be the case, it is said to be a necessary consequence of that intent, that those persons who claimed the purchased estates under him would also be entitled under him to one-third of a moiety of the reversion of the settled estates, of which he was seised as heir at law of Mr. *Farrington*. But *non constat* that the testator knew he was seised of this estate at the time when he made his will, and what he would have done had it been stated to him at that time that he was so seised, I will not allow myself, sitting as a judge, to speculate, because I consider that to be the most dangerous mode of construction which can possibly be adopted. There is indeed nothing absurd in supposing that his object was to annex the two estates together, provided his wife should not be molested: and taking it for granted that this was his object, it has been argued, that it would be inconsistent with that object to suppose that the testator intended any person to take this third of a moiety, except those who should be the heirs at law of Mr. *Farrington*. But this argument proceeds upon the supposition that the testator knew that he was one of the heirs of Mr. *Farrington*. Supposing however that the testator had been the sole heir of Mr. *Farrington*, this circumstance would not be sufficient to restrain the operation of the residuary clause. In that case the annexation of the two estates would have been unnecessary to guard his wife from molestation after the expiration of the entail: for if he were entitled to the

reversion, his wife would derive the best security for her quiet enjoyment, by taking the reversion under the residuary clause. We are therefore of opinion, that if the testator had been the sole heir of Mr. *Farrington*, the residuary words would have been sufficient to carry the estate. The case then would have amounted to this, that the testator at the time when he made his will was seised of an estate, of which he was not cognizant; and that it is not inconsistent with the rest of his will to permit that estate to be included in the residuary clause. I will now state the cases from which it appears to me that we are not at liberty to exclude any real interest from the operation of this residuary clause. The first case which I shall mention is that of *Strong v. Teatt*, in which it was held that the reversion was not included in the residuary clause. Lord *Mansfield*, in giving his judgment, which was afterwards confirmed in the House of Lords, states the question to be, "Whether by this sweeping residuary clause the testator intended to devise the reversion?" He then says, "The generality of the expression, 'and also all other the lands, tenements, and hereditaments, in the said counties of *Tyrone* and *Meath*, or either of them, whereof I am seised in fee-simple, or of which any other person is seised in trust for me, together with their and every of their appurtenances,' if unrestrained and unqualified by any other words, would carry all the testator's estate in possession, reversion or remainder. But these general words may, by other words and expressions in the will, be restrained to any or either of these: and it is the same thing whether it be directly expressed, or clearly and plainly to be collected from the will. Now" he observes, "here are plain expressions, which are fully sufficient to shew that the testator did not intend to devise the reversion of this settled estate." Then, after stating the numerous inconsistencies which would arise from supposing that the reversion was intended to pass, he says, "The consequence is too manifest to bear an argument: if it be but attended to what absurdities must follow from construing the reversion to pass;" and after commenting upon the particular expressions of the will, and the description of locality in the residuary clause, he adds, "But these minute and critical observations serve only to weaken the argument; since there are in this will sufficient general words, which expressly and clearly shew that the testator had no intention to include the reversion of the settled estate in his will, as much as if he had used particular words and

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expressions to declare it directly and explicitly;" and concludes, "It appears clearly upon the very words of the whole will taken together, that there can be no doubt of the testator's intention, that the reversion of the settled estate should not be included in it, but only the lands which he had in possession." Mr. Justice *Wilmot* wondered how any one could entertain any doubt upon the question; it being as clear, he said, upon the whole tenor and complexion of the will as the strongest express negative clause could make it. The Court therefore did not proceed upon the argument of presumption of an intention to exclude, but upon the inconsistencies and absurdities which would arise from including the estate in question. In the next case which I shall state, it was held that the estate in question was included in the residuary clause, and that inference and presumption were not sufficient to exclude it. That was the case of *Freeman v. The Duke of Chandos*. As far as inference, conjecture, and supposition could avail, there was every reason for holding that the estate was intended to be included; but there was no inconsistency in holding the contrary. The Court certified, "that though the remote reversion might not be particularly thought of, yet the general words were sufficient to include it, and the intention of the parties was to include all. Therefore they were of opinion that the reversion in fee of one undivided seventh part of the estate in question did pass by the act of Parliament in the pleadings mentioned to the Defendant the Duke of *Chandos*." From this case I collect, that the same principle which induced the Court in *Strong v. Teatt* to hold the estate excluded, here prevailed to induce them to hold it included: there being no inconsistency in permitting the words to have their legal effect, the Court would not by surmise contract their operation. There is another case which is not immaterial in the present consideration, namely, that of *Smith d. Davis v. Saunders*, in which a principle was laid down upon which we must decide this case, viz. that a residuary clause will extend to every latent reversion which the testator may have in him, unless it be expressly excluded by devise to some other person, though indeed if such latter devise be to the testator's own right heirs, it will equally operate as an exclusion of the residuary devise, though the heirs cannot take as purchasers. The question therefore recurs to this, Whether it appears from any particular clause of this will, or from the general intent of the testator manifested in the will, that it would be

inconsistent with the other parts of the will to permit the residuary clause to take its legal effect? We are of opinion, that there is not sufficient in this will to shew any such inconsistency or repugnancy. The general intent would not be obstructed, but on the contrary would rather be promoted, by suffering the testator's wife to take this share of the reversion, since she would thereby be enabled to protect herself to the extent of such share against molestation: and yet this is the only circumstance which has been materially relied upon for the lessors of the Plaintiff. With respect to the circumstance of the testator having had an estate out of the county of *Kent*, which might satisfy the words of the residuary clause, it does not follow from thence that the reversion in question was to be excluded; for, I have before observed, that it is not necessary that the testator's mind should be active in including it. The will as it stands, speaks thus, "If Mr. *Charles Townshend* shall die without issue, my wife will take my share of the reversion." Whether, if the testator had been informed that he was entitled to dispose of this reversion, he would have given it to his wife or not, we cannot undertake to decide; but there certainly is nothing in the particular provisions of the will, or the general intent of the testator, to warrant the Court in saying that such a disposition is manifestly repugnant to either.

Per Curiam,

Let the *Postea* be delivered to the Defendants.

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1. Taking out a summons for a further time to plead is no waiver of the Defendant's right to move to change the venue, *Wilson v. Harris*, M. 41 Geo. 3. Page 320
2. It seems the Court will not change the venue in an action on an award, even though the declaration contain the common counts. *Whitburn v. Staines*, H. 41 Geo. 3. Page 355
3. Nor will they oblige the Plaintiff to undertake to give evidence on the count upon the award. *ib.*

VERDICT,

See INSURANCE, 7.

U.

USAGE,

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USE AND OCCUPATION.

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USURY.

1. A. lent B. 500*l.*, and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed B. gave A. 50*l.* and paid interest at the rate of 5 per cent. on the 500*l.* for five years, at the end of which time an action was brought against A. for usury: Held that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.*, and consequently the interest at the rate of 5 per cent. on the 500*l.* received within the last year was usurious. *Scurry, q. t. v. Freeman*, E. 41 Geo. 3. 381
2. If a draft be given for usurious interest and a receipt taken for it in the county of A. and the draft be afterwards exchanged for money in the county of B. the usury is committed in the county of B., and the venue must be laid there, *id.* *ib.*

W.

WAGES.

The 37 Geo. c. 73. s. 3. having prohibited more than double monthly wages, being given to seamen coming from the West In-

dies, unless the captain be specially licensed to give a greater rate by the chief officer of the port; a general licence by such chief officer to a captain "to procure men on such terms as he can," is void. *Rogers v. Lacy*, H. 40 Geo. 3. Page 57

2. A sailor in addition to the wages contained in the ship's articles, sued for the average price of a negro slave, for which he had agreed with the captain, though no mention of such perquisite was made in the articles: Held that the contract for the average price of a negro slave was void; such additional perquisite being in fact wages, and therefore only to be recovered where included in the articles according to 2 Geo. 2. c. 36. *White v. Wilson*, H. 40 Geo. 3. 116

WAGER,

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No action will lie on a wager, though above 50*l.*, that a single horse shall run on the high road from A. to B. and arrive sooner than one of two horses placed at any distance the owner shall please; such a race not being legalized by the 13 Geo. 2. c. 19, and 18 Geo. 2. c. 34. s. 11. *Whaley v. Pajot*, M. 40 Geo. 3. 51

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WASTE.

1. In an action of waste, on the statute of Gloucester, against a tenant for years for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the Court will permit the Defendant to enter up judgment for himself. *The Keepers and Governors, &c. of Hartwell School v. Alderton*, H. 40 Geo. 3. 86 & C.
2. And

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2. And this principle holds whether the waste consist in the alteration of the property, or in the deterioration of it, *id.* Page 86

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THE END OF THE SECOND VOLUME.

